UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

	§	**Chapter 11**
In re:	§	
	§	**Case No. 20-43597-399**
BRIGGS & STRATTON CORPORATION, *et al.*,	§	
	§	**(Jointly Administered)**
	§	
Debtors.	§	Hearing Date: December 18, 2020
	§	Hearing Time: 9:00 a.m. (Central Time)
	§	Hearing Location: Courtroom 5 North
	§	111 S. 10th St., St. Louis, MO 63102

MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF SECOND AMENDED JOINT CHAPTER 11 PLAN OF BRIGGS & STRATTON CORPORATION AND ITS AFFILIATED DEBTORS AND RESPONSE TO OBJECTIONS TO CONFIRMATION

WEIL, GOTSHAL & MANGES LLP
Ronit J. Berkovich
Debora A. Hoehne
Martha E. Martir
Eli Blechman
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

CARMODY MACDONALD P.C.
Robert E. Eggmann
Christopher J. Lawhorn
Thomas H. Riske
120 S. Central Avenue, Suite 1800
St. Louis, Missouri 63105
Telephone: (314) 854-8600
Facsimile: (314) 854-8660

Attorneys for Debtors
and Debtors in Possession

Dated: December 16, 2020
St. Louis, Missouri

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Briggs & Stratton Corporation and its debtor affiliates, as debtors and debtors in possession (collectively, the "**Debtors**") in the above-captioned chapter 11 cases (the "**Chapter 11 Cases**") pending in the United States Bankruptcy Court for the Eastern District of Missouri (the "**Bankruptcy Court**"), hereby submit this (i) memorandum of law (the "**Memorandum**") in support of the *Second Amended Joint Chapter 11 Plan of Briggs & Stratton Corporation and its Affiliated Debtors* filed on December 16, 2020 [Docket No. 1434] (collectively with all schedules and exhibits thereto, and as may be modified, amended, or supplemented from time to time, the "**Plan**")[1] pursuant to section 1129 of title 11 of the United States Code (the "**Bankruptcy Code**"), and (ii) omnibus reply to objections, joinders, responses, and reservation of rights (collectively, the "**Objections**")[2] to confirmation of the Plan, and respectfully represent as follows:

PRELIMINARY STATEMENT

1. The Debtors are pleased to be before the Court seeking confirmation of a Plan[3] that is supported by the Creditors' Committee and was overwhelmingly accepted by all classes of voting creditors. Remarkably, in a case with thousands of creditors, no creditors are objecting to the Plan.

2. From the beginning, the Debtors pursued their goals in these Chapter 11 Cases of maximizing recovery for unsecured creditors by implementing a comprehensive restructuring through the sale of substantially all of their assets and equity interests and seeking

[1] Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Plan or the Solicitation Procedures Order (as defined herein), as applicable.

[2] The Objections include the Objections filed by the following parties (each an "**Objector**" and, collectively, the "**Objectors**"): A.B. Boyd Co. ("**AB**"), Aavid Allcast, LLC ("**Aavid**") [Docket No. 1396]; UFP Technologies, Inc. ("**UFPT**") [Docket No. 1395]; Oracle America, Inc. ("**Oracle**") [Docket No. 1400]; the United States Securities and Exchange Commission (the "**SEC**") [Docket No. 1401]; the United States Trustee for the Eastern District of Missouri (the "**U.S. Trustee**") [Docket No. 1405]; and certain of the Debtors' insurers of asbestos-related claims [the "**Insurers**") [Docket No. 1406]. All but two of the Objections have been resolved, as explained in the Objection Chart (defined below); the only Objections that remain outstanding are the Objections filed by the U.S. Trustee and the SEC.

consensus to minimize litigation costs. The Debtors successfully achieved these goals via a strategy of (i) marketing and selling their assets to the highest or best bidder, (ii) reaching a global settlement with the Creditors' Committee, the Pension Benefit Guarantee Corporation (the "**PBGC**"), the DIP Agent, and the other DIP ABL Secured Parties (the "**Global Settlement**"), and (iii) negotiating and finalizing the Plan (which incorporates the Global Settlement), the consummation of which will limit the Debtors' time in chapter 11, facilitate the resolution of claims, and ensure a fair and orderly process for distributions to creditors.

3. The success of this Plan lies in its functionality—providing an efficient allocation methodology that recognizes the relative assets and liabilities of each Debtor, while minimizing administrative costs and providing a roadmap for distributions to creditors. At a more detailed level, the Plan provides for, among other things:

a. appointment of a Plan Administrator to oversee the Plan and Wind-Down process, including, but not limited to, liquidating/monetizing remaining assets, resolving disputed claims, and making distributions to creditors under the Plan;

b. implementation of the provisions of the Global Settlement, including the PBGC Subordination and settled Allowed Claim amounts for the PBGC Allowed General Unsecured Claims;

c. allocation of the Net Cash Proceeds among the five Debtor entities and separate treatment of Claims against each Debtor;[4]

d. classification of certain Impaired Claims in Classes 4(a) through 7(a), which classification underpins the structure of the overall Plan; and

e. procedures to determine Allowed Claims in each Class and make distributions in respect thereof.

[4] The allocation is based on an analysis by the Debtors' financial advisor, Houlihan Lokey, in consultation with the Creditors' Committee's financial advisor. It allocates the Net Cash Proceeds based on an equal weighting of revenue, assets, and adjusted EBITDA, subject to adjustments made based on bids received for the different entities, certain remaining assets, and other qualitative factors such as intercompany relationships between the entities.

4. The success of the Plan and the Global Settlement is also evidenced by the support and acceptance of the Plan by the Debtors' creditors. The voting results, as described in the Voting Certification (as defined herein), are summarized in the table below:

Class	Accept		Reject		Result
	Amount (% of Amount Voted)	Number (% of Number Voted)	Amount (% of Amount Voted)	Number (% of Number Voted)	
Class 4(a)	$392,040,654.66 96.35%	600 84.75%	$14,841,485.60 3.65%	108 15.25%	Accept
Class 4(b)	$315,628,592.21 99.24%	231 79.93%	$2,419,313.85 0.76%	58 20.07%	Accept
Class 4(c)	$314,785,395.38 99.39%	202 77.39%	$1,932,686.87 0.61%	59 22.61%	Accept
Class 4(d)	$220,917,500.00 100.00%	1 100.00%	$0.00 0.00%	0 0.00%	Accept
Class 4(e)	$220,917,500.00 100.00%	1 100.00%	$0.00 0.00%	0 0.00%	Accept

5. The remarkable support for the Plan speaks volumes to its fairness, the good faith efforts that culminated in its filing, and its compliance with the Bankruptcy Code. As demonstrated herein, the Plan satisfies all of the confirmation standards of section 1129 of the Bankruptcy Code and achieves the objectives of chapter 11. Only six formal Objections were filed to the Plan. Certain of the Objections have been addressed and/or resolved through the modification of language in the Plan or addition of language to the proposed order confirming the Plan (the "**Confirmation Order**").[5] Only two of the Objections remain outstanding: (i) the Objection filed by the U.S. Trustee and (ii) the Objection filed by the SEC. Importantly, no

[5] Copies of the (proposed) Confirmation Order will be made available on the Debtors' case information website at http://www.kccllc.net/Briggs.

creditors have outstanding Objections to the Plan—only two government agencies with no claims against the estates.

6. Attached hereto as **Exhibit A** is a chart (the "**Objection Response Chart**") identifying each of the filed Objections and the Debtors' responses thereto. The outstanding Objections are also addressed in more detail in Part III herein. The Debtors have also resolved certain informal comments through language in the Plan as well as in the Confirmation Order, which counsel will address at the hearing for the Court's consideration.[6] The Debtors submit that, as reflected herein and in the Objection Response Chart, most Objections have been addressed, withdrawn or otherwise resolved, and the two outstanding Objections are without merit as to any remaining issues and should be overruled.[7] Accordingly, the Debtors are proceeding to the Confirmation Hearing with an almost entirely consensual Plan.

7. For the reasons set forth herein and in the Ficks Declaration, and as will be established by the Debtors at the Confirmation Hearing, the Plan satisfies each applicable requirement for confirmation under the Bankruptcy Code, is in the best interests of creditors, and should be confirmed.

BACKGROUND AND RELEVANT FACTS

8. On July 20, 2020 (the "**Petition Date**"), the Debtors each commenced with this Court a voluntary case under title 11 of the United States Code (the "**Bankruptcy Code**"). The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors'

[6] The Debtors resolved certain informal comments from the Department of Justice, California Air Resources Board, Mississippi Department of Revenue.

[7] Notwithstanding, the Debtors are continuing to work to narrow the outstanding issues in advance of the Confirmation Hearing.

chapter 11 cases are being jointly administered for procedural purposes only pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**") and Rule 1015(b) of the Local Rules of Bankruptcy Procedure for the Eastern District of Missouri (the "**Local Rules**").

9. On August 5, 2020, the United States Trustee appointed an official committee of unsecured creditors (the "**Creditors' Committee**") in these chapter 11 cases pursuant to section 1102 of the Bankruptcy Code. No trustee or examiner has been appointed in these chapter 11 cases.

10. On August 24, 2020 the Court entered an order [Docket No. 564] (the "**Bar Date Order**") establishing certain deadlines (collectively, the "**Bar Dates**") and procedures for the filing of proofs of claim in the Chapter 11 Cases (each a "**Proof of Claim**"). Specifically, the Bar Date Order established, among other things, the following deadlines for filing Proofs of Claim:

- **General Bar Date**: October 7, 2020 at 11:59 p.m. (Prevailing Central Time) as the deadline for all creditors other than Governmental Units to file proofs of claim against the Debtors.
- **Governmental Bar Date**: January 19, 2021 at 11:59 p.m. (Prevailing Central Time) as the deadline for all Government Units to file proofs of claim against the Debtors.
- **Amended Schedules Bar Date**: in the event the Debtors file a notice of previously unfiled Schedules (as defined in the Bar Date Order) or notice of an amendment or supplement to the Schedules, such notice shall clearly indicate the deadline[8] by which each claimant holding a claim affected by such filing, amendment, or supplement must file a Proof of Claim with respect to such claim.

[8] The Amended Schedules Bar Date, in each instance, is the date that is the later of (i) the General Bar Date or the Governmental Bar Date (if the amendment relates to a claim of a Governmental Unit), and (ii) 11:59 p.m. (prevailing Central Time) on the date that is forty (40) days from the date on which the Debtors provide notice of previously unfiled Schedules (as defined herein) or an amendment or supplement to the Schedules. *See Motion of Debtors for Entry of Order (I) Establishing Deadlines for Filing Proofs of Claim and Procedures Relating Thereto and (II) Approving Form and Manner of Notice Thereof* [Docket No. 283] (the "**Bar Date Motion**"), ¶ 4(c).

- **Rejection Damages Bar Dates**: In accordance with the Bar Date Order and the *First Omnibus Order (I) Authorizing (A) Rejection of Certain Executory Contracts and Unexpired Leases and (B) Abandonment of Property in Connection Therewith; and (II) Granting Related Relief* [Docket No. 1297] (the "**Rejection Order**"), the deadline by which a claimant asserting damages arising from the rejection of an executory contract or unexpired lease must file a proof of claim for damages arising from such rejection by December 30, 2020 at 11:59 p.m. (Prevailing Central Time).[9] In accordance with the Plan, any executory contract or unexpired lease rejected pursuant to the Plan must file a proof of claim no later than thirty (30) days after the filing and service of the notice of the occurrence of the Effective Date.[10]

See Bar Date Order, ¶¶ 1-4.

11. The Debtors served notice of the Bar Dates on creditors in the Chapter 11 Cases (the "**Bar Date Notice**") and published the Bar Dates (the "**Publication Notice**") in *The New York Times* (national edition) and once in the *St. Louis Post Dispatch.*[11]

12. On October 19, 2020, the Court entered an order [Docket No. 1121] (the "**Administrative Expense Claims Bar Date Order**") establishing certain deadlines (the "**Administrative Expense Bar Dates**") and procedures for filing requests for payment of administrative expense claims, including the following deadlines:

- **General Administrative Expense Bar Date**: November 23, 2020 at 5:00 p.m. (Prevailing Central Time) as the deadline to file proofs of claim for all persons and entities (other than Governmental Units) that assert an entitlement to administrative expense status under section 503 (excluding holders of claims under section 503(b)(9)) and/or 507 of the Bankruptcy Code with respect to Claims arising between the Petition Date and October 19, 2020.

- **Governmental Administrative Expense Bar Date:** January 19, 2021 at 5:00 p.m. (Prevailing Central Time) as the deadline to file a proof of claim for all Governmental Units that assert an entitlement to administrative expense status under sections 503 and/or 507 of

[9] *See* Rejection Order, ¶ 4.

[10] *See* Plan, § 8.1.

[11] *See* Bar Date Order, ¶ 10.

> the Bankruptcy Code with respect to Claims arising between the Petition Date and October 19, 2020.

See Administrative Expense Claims Bar Date Order, ¶¶ 1-2; *see also* Plan, §§1.2-1.3. The Debtors served notice of the Administrative Expense Bar Dates on creditors in the Chapter 11 Cases (the "**Administrative Expense Bar Date Notice**") and published the Administrative Expense Bar Date Notice in both *The New York Times* (national edition) and the *St. Louis Post Dispatch.*[12]

13. The Debtors commenced the Chapter 11 Cases with a stalking horse bid from the Purchaser (as defined herein), after a robust, months-long marketing process conducted by the Debtors and their advisors in pursuit of the most beneficial solution for the Debtors and their creditors. On the Petition Date, the Debtors filed their Bidding Procedures Motion.[13] On August 19, 2020, the Court entered the Bidding Procedures Order,[14] which, among other things, (a) approved bidding procedures in connection with the sale of the Debtors' assets, (b) approved the designation of a stalking horse bidder and stalking horse bid, (c) scheduled an auction to take place on September 1, 2020 (if necessary), and (d) scheduled a sale hearing for September 15, 2020. Through the Stalking Horse Agreement, the Debtors secured a guaranteed purchase price of $550 million (subject to adjustment) plus assumed liabilities for their business. Furthermore, through the bidding procedures developed by the Debtors and their advisors, the Debtors retained

[12] *See* Administrative Expense Bar Date Order, ¶ 8; *see also Certificate of Service* [Docket No. 1146] (certifying service of Administrative Expense Bar Date Notice).

[13] *Motion of Debtors for Entry of an Order (I) Approving (A) Bidding Procedures, (B) Designation of Stalking Horse Bidder and Stalking Horse Bid Protections, (C) Scheduling Auction and Sale Hearing, (D) Form and Manner of Notice of Sale, Auction, and Sale Hearing, and (E) Assumption and Assignment Procedures; (II) Authorizing (A) Sale of Debtors' Asserts and Equity Interests Free and Clear of Liens, Claims, Interests, and Encumbrances and (B) Assumption and Assignment of Executory Contracts and Unexpired Leases; and (III) Granting Related Relief* [Docket No. 53] (the "**Bidding Procedures Motion**").

[14] *Order (I) Approving (A) Bidding Procedures, (B) Designation of Stalking Horse Bidder and Stalking Horse Bid Protections, (C) Scheduling Auction and Sale Hearing, (D) Form and Manner of Notice of Sale, Auction, and Sale Hearing, and (E) Assumption and Assignment Procedures and Form and Manner of Notice of Assumption and Assignment and (II) Granting Related Relief* (Docket No. 505) (the "**Bidding Procedures Order**").

the right to seek and accept higher or better bids allowing for potential increased recovery for creditors. While the Debtors did not receive a higher or better bid, the Debtors believe the purchase price received from the Purchaser reflects the value of their assets and allows creditors to receive the largest possible recovery from the Debtors' estates under the circumstances. Moreover, as part of the Global Settlement (as defined below), the Purchaser assumed certain of the Debtors' pension obligations, which afforded the Debtors greater flexibility in negotiating with the PBGC and navigating these Chapter 11 Cases.[15]

14. In the weeks leading up to the hearing to approve the Sale Transaction (as defined herein), the Debtors entered into extensive negotiations with the Creditors' Committee, the PBGC (the Debtors' largest creditor), the DIP Agent and DIP Lenders (as defined below), and the Purchaser (the "**Settlement Parties**") to resolve the Creditors' Committee's and the PBGC's potential objections to the Sale Transaction and to ensure the Debtors could consummate the Sale Transaction and subsequent Plan with the support of the Creditors' Committee and the PBGC. The Settlement Parties were able to reach a global settlement (the "**Global Settlement**"), by which the Settlement Parties consented to the Sale Transaction and agreed to certain terms relevant to the Plan, including the following:

a. termination of the Briggs & Stratton Pension Plan and assumption of the sponsorship of such plan by the PBGC;

b. settlement of the allowance of the PBGC Allowed General Unsecured Claims in the amount of no more than $225 million against each Debtor;

c. agreement by the PBGC to support a chapter 11 plan effectuating a limited subordination of the PBGC Allowed General Unsecured Claims (the "**PBGC Subordination**"), in that the first $5 million

[15] *See* Sale Order, ¶ 37(a) ("The Purchaser has agreed to assume sponsorship of The Briggs & Stratton Cash Balance Retirement Plan as of the Closing Date pursuant to the Stalking Horse Agreement . . . .").

that the PBGC would otherwise recover will be subordinated to the recovery of all other Allowed General Unsecured Claims;

d. reduction by $800,000 of the DIP Obligations the Debtors are required to pay the ABL Secured Parties on account of consummation of the Sale Transaction (the "**Released Obligations**");

e. releases by the Creditors' Committee (and in its members' individual capacities as creditors) of any rights to assert or prosecute any Challenge against any the ABL Released Parties;

f. releases of all causes of action under chapter 5 of the Bankruptcy Code; and

g. agreement by the Debtors and the Creditors' Committee to work in good faith on a chapter 11 plan to facilitate and give effect to the Global Settlement.

See Sale Order, ¶ 37. The Global Settlement also contemplated that the parties would seek confirmation of the Plan that "facilitates, implements, and otherwise gives effect to the [Global Settlement]" in order to maximize the recoveries available for unsecured creditors. Sale Order at ¶¶ 37(g).

15. On September 15, 2020, the Court entered the Sale Order[16] authorizing the Debtors to sell substantially all of their assets (the "**Sale Transaction**") to Bucephalus Buyer, LLC (the "**Purchaser**") and approving the Global Settlement. On September 21, 2020, the Debtors closed the Sale Transaction.[17]

16. Following the Sale Transaction, the Debtors focused their efforts and resources on developing and filing a workable and confirmable chapter 11 plan of liquidation supported by the Creditors' Committee, the PBGC, and other parties in interest.

[16] *Order (I) Authorizing the Sale of the Assets and Equity Interests to the Purchaser Free and Clear of Liens, Claims, Interests, and Encumbrances; (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (III) Granting Related Relief* [Docket No. 898] (the "**Sale Order**").

[17] *See Notice of (I) Filing of Amendment to Stock and Asset Purchase Agreement, And (II) the Occurrence of Closing of the Sale Transaction* [Docket No. 964].

17. On October 9, 2020, after weeks of negotiation and discussion with the Creditors' Committee, the Debtors first filed the Plan and accompanying Disclosure Statement (as defined below).[18] The Plan incorporates the terms of the Global Settlement and provides for the orderly distribution of each Debtor's available cash, including (i) net cash proceeds received by the Debtors from the Sale Transaction (including any proceeds to be received post-closing) (the "**Sale Transaction Proceeds**"), and (ii) cash realized from the Debtors' other assets and their wind-down operations, including the sale of any remaining assets that were not included in the Sale Transaction (the "**Wind-Down Proceeds**").

18. The Plan provides that the Sale Transaction Proceeds and any other assets of the Debtors Estates will *first* be used to fund the ongoing wind-down costs of the Chapter 11 Cases. The "Wind-Down Costs" include, but are not limited to, payments of Allowed Administrative Expense Claims, Fee Claims, DIP Claims, and Statutory Fees.[19]

19. After funding the Wind-Down Costs, the remaining Sale Transaction Proceeds and Wind-Down Proceeds (the "**Net Cash Proceeds**") will be allocated among the Debtors' Estates to make distributions to holders of Allowed Claims against each Debtor, pursuant to the following allocation:

a) 79.0% of the Net Cash Proceeds shall be allocated to BSC;

b) 8.1% of the Net Cash Proceeds shall be allocated to BGI;

[18] *See Joint Chapter 11 Plan of Briggs & Stratton Corporation and Its Affiliated Debtors* [Docket No. 1066].

[19] Specifically, the Plan provides that the Sale Transaction Proceeds and Wind-Down Proceeds shall be used, first, to (a) pay holders of Allowed (or reserve for holders of Disputed) Administrative Expense Claims, Fee Claims, and DIP Claims; (b) to fund the wind-down process (pursuant to a wind-down budget); and (c) to satisfy any Statutory Fees required to be paid in accordance with the Bankruptcy Code, the Bankruptcy Rules or any order of the Bankruptcy Court (collectively, the "**Wind-Down Costs**"). *See* Plan, § 1.70 (defining "Net Cash Proceeds," *i.e.*, the amount to be allocated among the Debtors' Estates, to mean the amount of the Sale Transaction Proceeds and amounts realized from the Debtors' business and/or Wind-Down operations *less* the amounts enumerated in this footnote).

c) 6.7% of the Net Cash Proceeds shall be allocated to ABI;

d) 4.8% of the Net Cash Proceeds shall be allocated to BSI; and

e) 1.4% of the Net Cash Proceeds shall be allocated to BST.

See Plan, §§ 1.70-1.75. This allocation is based on an analysis by the Debtors' financial advisor, Houlihan Lokey, in consultation with the Creditors' Committee's financial advisor. It allocates the Net Cash Proceeds based on an equal weighting of revenue, assets, and adjusted EBITDA, subject to adjustments made based on bids received for assets of the different entities, certain remaining assets, and other qualitative factors such as intercompany relationships between the entities. *See* Disclosure Statement, § I.B.

20. The Plan further provides that the Net Cash Proceeds allocable to each Debtor shall be distributed first to each Debtor's priority and other secured claims and then pro rata (proportionately) to holders of Allowed General Unsecured Claims against such Debtor, in each case after giving effect to the PBGC Subordination. The Debtors do not expect there to be a recovery for shareholders.

21. Importantly, the Plan constitutes a separate chapter 11 plan for each Debtor and is not premised upon the substantive consolidation of the Debtors or their assets or liabilities. The Plan is being proposed as a joint plan of the Debtors for administrative purposes only. Accordingly, if the Bankruptcy Court does not confirm the Plan with respect to one or more Debtors, it may still confirm the Plan with respect to any other Debtor that satisfies the confirmation requirements of section 1129 of the Bankruptcy Code.

22. On November 10, 2020, the Court entered an order [Docket No. 1233] (the "**Solicitation Procedures Order**") approving the Debtors' Solicitation and Voting Procedures and the *Amended Disclosure Statement for Amended Joint Chapter 11 Plan of Briggs & Stratton*

Corporation and its Affiliated Debtors [Docket No. 1227] (collectively with all schedules and exhibits thereto, and as may be modified, amended, or supplemented from time to time, the "**Disclosure Statement**").

23. With the Solicitation Procedures Order, the Court, among other things, (i) established the Solicitation and Voting Procedures with respect to the Plan; (ii) established notice and objection procedures with respect to the Plan; (iii) set December 11, 2020 at 5:00 p.m. (Prevailing Central Time) as the Voting Deadline; (iv) set December 11, 2020 at 5:00 p.m. (Prevailing Central Time) as the Plan Objection Deadline; and (v) scheduled the Confirmation Hearing to commence on December 18, 2020 at 9:00 a.m. (Prevailing Central Time).

24. Upon entry of the Solicitation Procedures Order, and in accordance with its terms, the Debtors, through their Voting Agent, Kurtzman Carson Consultants LLC ("**KCC**"), caused the applicable Solicitation Packages (as defined in, and approved by, the Solicitation Procedures Order) to be transmitted to and served on holders of Claims or Interests in the applicable Classes. *See Certificate of Service*, dated November 18, 2020 [Docket No. 1301] (the "**Solicitation Affidavit**"). In particular, through First Class Mail, the Debtors solicited votes on the Plan from the holders of Claims in the Classes of Claims entitled to vote to accept or reject the Plan: Class 4(a) – General Unsecured Claims against BSC, Class 4(b) – General Unsecured Claims against BGI, Class 4(c) – General Unsecured Claims against ABI, Class 4(d) – General Unsecured Claims against BSI, and Class 4(e) – General Unsecured Claims against BST (each, a "**Voting Class**" and, collectively, the "**Voting Classes**"). *See generally, Solicitation Affidavit*. The Ballots distributed to holders of Claims in the Voting Classes contained an opt-out election, enabling each individual holder to "opt out" of the releases contained in Section 10.6 of the Plan (as long as such holder either abstained from voting or voted to reject the Plan, *i.e.*, each holder could "opt out" as

long as such holder did not vote to accept the Plan). Notices of Non-Voting Status were sent to the Non-Voting Classes.[20] The Notices of Non-Voting Status contained an Opt-Out Election Form, which allowed holders of Claims or Interests in the Non-Voting Classes to opt out of the releases contained in Section 10.6 of the Plan by submitting the Opt-Out Election Form. *See* Solicitation Motion, Ex. D, E [Docket. No. 1072].

25. In addition, the Debtors published notice of the Confirmation Hearing once in the national edition of each of *The New York Times* and the *St. Louis Dispatch*, as evidenced in the *Certificate of Publication* [Docket No. 1302], dated November 18, 2020 (the "**Publication Affidavit**").

26. On December 4, 2020, the Debtors filed the Plan Supplement [Docket No. 1369], containing the following documents and information:

- Amendments to the Articles of Incorporation for the following Debtors: Briggs & Stratton Corporation, Allmand Bros., Inc., Billy Goat Industries, Inc., and Briggs & Stratton International, Inc.;
- Plan Administrator Agreement;
- Schedule of Assumed Contracts (contracts assumed by the Debtors, in contrast to contracts previously assumed and assigned to the Purchaser);
- Section 1129(a)(5) Disclosure; and
- Schedule of Retained Causes of Action.

[20] *See generally, Solicitation Affidavit*. The term "Non-Voting Classes" refers the following Classes of Claims or Interests, which are not entitled to vote under the Plan: Classes 1(a) through 1(e) – Priority Tax Claims, Classes 2(a) through 2(e) – Priority Non-Tax Claims, Classes 3(a) through 3(e) – Other Secured Claims, Classes 5(a) through 5(e) – Subordinated Securities Claims, Classes 6(a) through 6(d) – Intercompany Interests, and Class 7(a) – Equity Interests in BSC (collectively, the "**Non-Voting Classes**"). *See generally*, Plan; *see also Motion of Debtors for Entry of Order (I) Approving Disclosure Statement; (II) Establishing Notice and Objection Procedures for Confirmation of Plan; (III) Approving Solicitation Packages and Procedures for Distribution Thereof; (IV) Approving Form of Ballots and Establishing Procedures for Voting on Plan; and (V) Granting Related Relief* (the "**Solicitation Procedures Motion**"), ¶ 37. Holders of Interests in Classes 6(a-d) did not receive a Notice of Non-Voting Status; such holders are all Debtors and therefore were deemed to have received all notices without actual notice. *See* Solicitation Procedures Motion, ¶ 37; *see also* Solicitation Procedures Order, ¶ 13.

See generally, Plan Supplement.

27. Except as set forth herein, the pertinent and salient facts relating to these Chapter 11 Cases and the Plan are set forth in the Plan, the Disclosure Statement, and the Plan Supplement. In addition, contemporaneously with or shortly following the filing of this Memorandum, the following certifications and declarations will be filed in support of confirmation of the Plan:

a. *Certification of Angela Nguyen of Kurtzman Carson Consultants LLC Regarding Voting and Tabulation of Ballots Cast on the Second Amended Joint Chapter 11 Plan of Liquidation of Briggs & Stratton Corporation and its Affiliated Debtors* (as may be amended, modified, or supplemented, the "**Voting Certification**");

b. *Declaration of Jeffrey Ficks in Support of Second Amended Joint Chapter 11 Plan of Liquidation of Briggs & Stratton Corporation and its Affiliated Debtors* (the "**Ficks Declaration**"); and

c. *Statement of the Official Committee of Unsecured Creditors in Support of Confirmation of the Debtors' Amended Joint Chapter 11 Plan of Briggs & Stratton Corporation and its Affiliated Debtors* (the "**Committee Statement**").

ARGUMENT

28. As set forth herein and as will be demonstrated at the Confirmation Hearing, the Plan satisfies all of the requirements for confirmation set forth in section 1129 of the Bankruptcy Code. The Objections are not supported by facts or applicable law and should be overruled. This Memorandum is divided into five (5) parts. Parts, I, II, and III address the requirements for confirmation of the Plan under section 1129 of the Bankruptcy Code and demonstrate the Plan's satisfaction of each requirement and achievement of the objectives of chapter 11. Part IV addresses the Objections, to the extent not already addressed in Part I, and establishes why each should be overruled and the Plan confirmed. Part V addresses the Debtors'

request for a waiver of the fourteen (14) day stay imposed by operation of Bankruptcy Rule 3020(e).

I. THE PLAN SATISFIES THE BANKRUPTCY CODE'S REQUIREMENTS FOR CONFIRMATION AND SHOULD BE APPROVED.

29. To obtain confirmation of the Plan, the Debtors must demonstrate that the Plan satisfies the applicable provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence. *See, e.g.*, *In re Union Fin. Servs. Grp., Inc.*, 303 B.R. 390, 421 (Bankr. E.D. Mo. 2003) ("The plan proponent bears the burden of proof by a preponderance of the evidence."); *In re Briscoe Enterprises, Ltd., II*, 994 F.2d 1160, 1165 (5th Cir. 1993) ("preponderance of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in a cramdown"); *In re Kent Terminal Corp.*, 166 B.R. 555, 561 (Bankr. S.D.N.Y. 1994) ("the final burden of proof [at the] confirmation hearings remains a preponderance of the evidence"); 7 Collier on Bankruptcy ¶ 1129.05[1][d] (16th ed. 2012). "[I]n the interest of equity, the Court should view all inferences drawn from the underlying facts and matters contained in the Plan and the Disclosure Statement in a light most favorable to the Debtor[s]." *In re Spanish Lake Assocs.*, 92 B.R. 875, 877 (Bankr. E.D. Mo. 1988).

30. For the reasons set forth herein and in filings with the Court, the Ficks Declaration, the Voting Certification, the Committee Statement, the record of these Chapter 11 Cases, and additional testimonial evidence that may be adduced at the Confirmation Hearing, the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code.

A. Section 1129(a)(1): The Plan Complies with the Applicable Provisions of the Bankruptcy Code.

31. Pursuant to section 1129(a)(1) of the Bankruptcy Code, a chapter 11 plan must comply with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). The legislative history of section 1129(a)(1) indicates that this provision encompasses the requirements

of sections 1122 and 1123 of the Bankruptcy Code, which, respectively, govern the classification of claims and the contents of a plan. *See* H.R. Rep. No. 95-595, at 412 (1977); *see also In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008); *In re Trans World Airlines, Inc.*, 185 B.R. 302, 311–13 (Bankr. E.D. Mo. 1995).

32. As demonstrated below, the Plan fully complies with the requirements of sections 1122 and 1123 of the Bankruptcy Code, as well as with all other applicable provisions of the Bankruptcy Code and thereby satisfies section 1129(a)(1) of the Bankruptcy Code.

B. Section 1122: The Plan's Classification Structure is Proper.

33. Section 1122 of the Bankruptcy Code provides that:

> Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

11 U.S.C. § 1122(a). A plan proponent has broad discretion in classifying claims and interests into multiple classes, provided that there is a reasonable basis to do so and all claims or interests within a given class are substantially similar. *In re Apex Oil Co.*, 118 B.R. 683, 696 (Bankr. E.D. Mo. 1990). Section 1122(a) of the Bankruptcy Code provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a). Similar claims and interests also can be separately classified. *See Hanson v. First Bank of S.D., N.A.*, 828 F.2d 1310, 1313 (8th Cir. 1987) ("We agree that 11 U.S.C. § 1122(a) does not prohibit the placement of substantially similar claims in different classes."), *abrogated sub nom. on other grounds Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993); *In re 11,111, Inc.*, 117 B.R. 471, 476 (Bankr. D. Minn. 1990) ("In *Hanson*, the Eighth Circuit expressly held that § 1122(a) does not prohibit the placement of substantially similar claims in different classes. Rather, § 1122 authorizes flexibility in

classification consistent with the rehabilitative purposes of chapter 11."); *see also In re Lightsquared Inc.*, 513 B.R. 56, 82–83 (Bankr. S.D.N.Y. 2014) ("Courts that have considered the issue [of classification], including the Court of Appeals for the Second Circuit . . . have concluded that the separate classification of otherwise substantially similar claims and interests is appropriate so long as the plan proponent can articulate a 'reasonable' (or 'rational') justification for separate classification.").

34. With the exception of Administrative Expense Claims, Fee Claims, and DIP Claims (which need not be classified pursuant to section 1123(a)(1) of the Bankruptcy Code), Sections 3 and 4 of the Plan classify thirty (30) Classes of Claims against and Interests in the Debtors, based on differences in the nature of the claimants and the legal nature or priority of such Claims against, and Interests in, the Debtors. The Plan designates the following thirty (30) Classes of Claims and Interests:

Class	Type of Claim or Interest	Treatment	Entitled to Vote
1(a)	Priority Tax Claims against BSC	Unimpaired	No (Presumed to accept)
1(b)	Priority Tax Claims against BGI	Unimpaired	No (Presumed to accept)
1(c)	Priority Tax Claims against ABI	Unimpaired	No (Presumed to accept)
1(d)	Priority Tax Claims against BSI	Unimpaired	No (Presumed to accept)
1(e)	Priority Tax Claims against BST	Unimpaired	No (Presumed to accept)
2(a)	Priority Non-Tax Claims against BSC	Unimpaired	No (Presumed to accept)
2(b)	Priority Non-Tax Claims against BGI	Unimpaired	No (Presumed to accept)
2(c)	Priority Non-Tax Claims against ABI	Unimpaired	No (Presumed to accept)
2(d)	Priority Non-Tax Claims against BSI	Unimpaired	No (Presumed to accept)
2(e)	Priority Non-Tax Claims against BST	Unimpaired	No (Presumed to accept)
3(a)	Other Secured Claims against BSC	Unimpaired	No (Presumed to accept)
3(b)	Other Secured Claims against BGI	Unimpaired	No (Presumed to accept)
3(c)	Other Secured Claims against ABI	Unimpaired	No (Presumed to accept)
3(d)	Other Secured Claims against BSI	Unimpaired	No (Presumed to accept)
3(e)	Other Secured Claims against BST	Unimpaired	No (Presumed to accept)
4(a)	General Unsecured Claims against BSC	Impaired	Yes
4(b)	General Unsecured Claims against BGI	Impaired	Yes
4(c)	General Unsecured Claims against ABI	Impaired	Yes
4(d)	General Unsecured Claims against BSI	Impaired	Yes
4(e)	General Unsecured Claims against BST	Impaired	Yes
5(a)	Subordinated Securities Claims against BSC	Impaired	No (Deemed to reject)
5(b)	Subordinated Securities Claims against BGI	Impaired	No (Deemed to reject)
5(c)	Subordinated Securities Claims against ABI	Impaired	No (Deemed to reject)
5(d)	Subordinated Securities Claims against BSI	Impaired	No (Deemed to reject)
5(e)	Subordinated Securities Claims against BST	Impaired	No (Deemed to reject)
6(a)	Intercompany Interests in BGI	Impaired	No (Deemed to reject)
6(b)	Intercompany Interests in ABI	Impaired	No (Deemed to reject)
6(c)	Intercompany Interests in BSI	Impaired	No (Deemed to reject)
6(d)	Intercompany Interests in BST	Impaired	No (Deemed to reject)
7(a)	Equity Interests in BSC	Impaired	No (Deemed to reject)

35. The Claims and Interests placed in each Class are substantially similar to the other Claims and Interests, as the case may be, in each such Class. In addition, to the extent that Claims or Interests of equal priority are placed in different Classes, valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Interests created under the Plan. The classifications were not implemented for improper purposes, and such Classes do not unfairly discriminate between holders of Claims and Interests.

C. Section 1123(a): The Plan's Content is Appropriate.

36. Section 1123(a) of the Bankruptcy Code sets forth seven (7) applicable requirements with which every chapter 11 plan must comply. Pursuant to this provision a plan must (1) designate classes of claims and interests; (2) identify classes of claims and interests that are not impaired under the plan; (3) specify the treatment of classes of claims and interests that are impaired under the plan; (4) provide the same treatment for each claim or interest within a particular class, unless the holder of a particular claim or interest agrees to less favorable treatment; (5) provide adequate means for the plan's implementation; (6) provide for the inclusion of a prohibition against the issuance of nonvoting shares in the debtor's charter; and (7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan. *See* 11 U.S.C. § 1123(a)(1)–(7). As demonstrated herein, the Plan complies with each of these requirements.

1. Section 1123(a)(1): Designation of Classes of Claims and Interests.

37. Section 1123(a)(1) of the Bankruptcy Code requires a plan to designate, subject to section 1122 and certain exceptions, classes of claims and equity interests. *See* 11 U.S.C. § 1123(a)(1). As discussed above, the Plan designates thirty (30) Classes of Claims and Interests. *See* Plan, §§ 3-4. Accordingly, the Plan satisfies the requirements of section 1123(a)(1) of the Bankruptcy Code.

2. Section 1123(a)(2): Specified Unimpaired Classes.

38. Section 1123(a)(2) of the Bankruptcy Code requires a plan to specify which classes of claims or interests are unimpaired by the plan. *See* 11 U.S.C. § 1123(a)(2). Whether a class is "impaired" is determined by the definition set forth in section 1124 of the Bankruptcy Code. *See* 11 U.S.C. § 1124. As specified in Sections 3 and 4 of the Plan, the following classes

are Unimpaired: Classes 1(a-e) (Priority Tax Claims against each Debtor), Classes 2(a-e) (Priority Non-Tax Claims against each Debtor), and Classes 3(a-e) (Other Secured Claims against each Debtor). *See* Plan, §§ 3.2, 4. Accordingly, the Plan satisfies the requirements of section 1123(a)(2) of the Bankruptcy Code.

3. Section 1123(a)(3): Specified Treatment of Impaired Classes.

39. Section 1123(a)(3) of the Bankruptcy Code requires a plan to specify how it will treat impaired classes of claims or interests. *See* 11 U.S.C. 1123(a)(3). Sections 3 and 4 of the Plan designate Classes 4(a-e) (General Unsecured Claims against each Debtor), Class 5(a-e) (Subordinated Securities Claims against each Debtor), Classes 6(a-d) (Intercompany Interests in each applicable Debtor), and Class 7(a) (Equity Interests in BSC) as impaired within the meaning of section 1124 of the Bankruptcy Code and specify the treatment of the Claims in such Classes, thereby satisfying section 1123(a)(3) of the Bankruptcy Code.

4. Section 1123(a)(4): Equal Treatment.

40. Section 1123(a)(4) of the Bankruptcy Code requires a plan to provide the same treatment for each claim or interest within a particular class, unless a holder of a claim or interest agrees to receive treatment that is less favorable to the treatment afforded to the other class members. *See* 11 U.S.C. § 1123(a)(4). The Plan provides for the same treatment by the Debtors for each Claim or Interest in each respective Class unless the holder of a particular Claim or Interest has agreed to a less favorable treatment of such Claim or Interest,[21] thereby satisfying section 1123(a)(4) of the Bankruptcy Code.

[21] Pursuant to the PBGC Subordination provision of the Global Settlement, as incorporated into the Plan, the PBGC agreed to subordinate the first $5 million that the PBGC would otherwise recover on account of the PBGC General Unsecured Claims, so that the PBGC will not recover any amounts allocated to classes 4(a), 4(b), and 4(c) until the PBGC Subordination is fully effectuated. *See* Plan, §§ 1.79, 4.16-4.18.

5. Section 1123(a)(5): Implementation of the Plan.

41. Section 1123(a)(5) of the Bankruptcy Code requires that a plan provide "adequate means for the plan's implementation." 11 U.S.C. § 1123(a)(5). The Plan and the various documents and agreements set forth in the Plan Supplement as well as the exhibits and schedules to the Plan provide adequate and proper means for the implementation of the Plan, thereby satisfying section 1123(a)(5) of the Bankruptcy Code, including, without limitation: (i) the funding of the Wind-Down Costs, (ii) the allocation of the Net Proceeds to the Debtors' estates; (iii) the appointment of the Plan Administrator and ability of the Plan Administrator, through the Plan Administrator Agreement, to oversee the Plan and Wind-Down process, including, but not limited to, liquidating/monetizing any remaining assets (through the formation of a liquidating trust, or otherwise), resolving disputed claims, and making distributions to creditors under the Plan.

42. In addition, the Plan implements the terms of the Global Settlement. The Global Settlement is an integral part of the Plan as it informs the distributions to unsecured creditors in these Chapter 11 Cases through terms including, but not limited to, (i) settlement of the PBGC Allowed General Unsecured Claims; (ii) the PBGC Subordination; and (iii) reduction of the DIP Obligations.

43. Accordingly, the Plan, together with the documents and agreements set forth in the Global Settlement and Plan Supplement, provide the means for implementation of the Plan as required by section 1123(a)(5).

6. Section 1123(a)(6): Non-Voting Equity Securities.

44. Section 1123(a)(6) of the Bankruptcy Code prohibits the issuance of nonvoting equity securities and requires amendment of a debtor's charter to so provide. *See* 11 U.S.C. § 1123(a)(6). As part of the Plan Supplement, the Debtors filed forms of amendments to the articles of incorporation (the "**Amended Organizational Documents**") for four of the five

Debtors: Briggs & Stratton Corporation, Billy Goat Industries, Inc., Allmand Bros., Inc., and Briggs & Stratton International, Inc. *See* Plan Supplement, Exhibit A. The Amended Organizational Documents of the applicable Debtors contain the following provision: "To the extent provided by Section 1123(a)(6) of chapter 11 of title 11 of the United States Code, the corporation shall not be permitted to issue any non-voting equity securities." *See* Plan Supplement, Exhibit A. The Amended Organizational Documents will be filed with the Secretary of State or equivalent governmental agency of the Debtors' respective states of incorporation.[22]

45. The Plan provides that on the Effective Date, all Equity Interests in BSC shall be cancelled and one share of BSC common stock (the "**Single Share**") shall be issued to the Plan Administrator. *See* Plan, § 4.30. In accordance with Section 5.16 of the Plan, the Single Share will also be deemed cancelled and of no further effect at the closing of the Chapter 11 Cases. *See* Plan, §§ 4.30, 5.16. Other than the Single Share, no new securities will be issued under the Plan.

46. Accordingly, the requirements of section 1123(a)(6) are satisfied in the Chapter 11 Cases.

7. Section 1123(a)(7): Designation of Directors and Officers.

47. Section 1123(a)(7) of the Bankruptcy Code requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." 11 U.S.C. § 1123(a)(7). As set

[22] The amendment to the articles of incorporation of Billy Goat Industries, Inc., will be filed with the Secretary of State of Missouri. The amendments to the articles of incorporation for Briggs & Stratton Corporation and Briggs & Stratton International, Inc., will be filed with the Department of Financial Institutions of the State of Wisconsin. The amendment to the articles of incorporation for Allmand Bros., Inc., will be filed with the Secretary of State of Nebraska.

forth in the Plan, the "Plan Administrator shall serve as the initial director or manager, as applicable, and sole officer of each Wind-Down Estate after the Effective Date." *See* Plan, § 5.4(c).[23] The Debtors filed with this Court, as part of the Plan Supplement, the identity of the Plan Administrator – Alan D. Halperin. *See* Plan Supplement, Exhibit B. The Plan Administrator was selected by the Debtors and such selection was acceptable to the Creditors' Committee. *See* Ficks Declaration, ¶ 29. The Plan, Plan Supplement, and Plan Administrator Agreement provisions concerning the selection or appointment of any officer, director, or manager are also supported by the Creditors' Committee; such provisions are consistent with the interests of creditors and equity security holders, at large, and with public policy, pursuant to section 1123(a)(7) of the Bankruptcy Code.

8. Section 1123(a)(8): Postpetition Personal Service Payments—Inapplicable Provision.

48. The Debtors are not "individuals" (as that term is defined in the Bankruptcy Code) and, accordingly, section 1123(a)(8) of the Bankruptcy Code is inapplicable to the Plan.

D. Section 1123(b): The Plan's Content is Permitted.

49. Section 1123(b) of the Bankruptcy Code sets forth six (6) permissive provisions that define what may be incorporated into a chapter 11 plan. Pursuant to this section, a plan may (1) impair or leave unimpaired any class of claims or interests; (2) provide for the assumption, assignment, or rejection of executory contracts and unexpired leases; (3) provide for the settlement of claims and/or the retention of claims or causes of action; (4) provide for the sale

[23] Section 5.4 of the Plan provides, in full, "The officers and directors of the Debtors existing prior to the Effective Date shall be relieved of any and all duties with respect to the Debtors as of the Effective Date without the need for them to resign or take any other action. The Plan Administrator shall serve as the initial director or manager, as applicable, and sole officer of each Wind-Down Estate after the Effective Date. The Plan Administrator shall elect such additional directors, managers and officers as the Plan Administrator deems necessary to implement this Plan and the actions contemplated herein. The Plan Administrator shall also have the power to act by written consent to remove any director, manager, or officer of any Wind-Down Estate." Plan, § 5.4.

of all or substantially all of the debtor's property; (5) modify or leave unaffected the rights of holders of claims; and (6) include any other appropriate provision not inconsistent with the Bankruptcy Code. *See* 11 U.S.C. § 1123(b)(1)–(6). As demonstrated herein, the Plan complies with section 1123(b).

1. Section 1123(b)(1): Impairment/Unimpairment of Classes of Claims and Interests.

50. Section 1123(b)(1) of the Bankruptcy Code provides that a plan may "impair or leave unimpaired any class of claims, secured or unsecured, or of interests." 11 U.S.C. § 1123(b)(1). As discussed above, consistent with section 1123(b)(1) of the Bankruptcy Code, Sections 3 and 4 of the Plan classify and describe the treatment for each Impaired and Unimpaired Class. As set forth in Sections 3 and 4 of the Plan, and pursuant to sections 1123(b)(1) and 1124 of the Bankruptcy Code, Classes 1(a-e) (Priority Tax Claims against each Debtor), Classes 2(a-e) (Priority Non-Tax Claims against each Debtor), and Classes 3(a-e) (Other Secured Claims against each Debtor) are Unimpaired; Classes 4(a-e) (General Unsecured Claims against each Debtor), Classes 5(a-e) (Subordinated Securities Claims against each Debtor), Classes 6(a-d) (Intercompany Interests in each applicable Debtor), and Class 7(a) (Equity Interests in BSC) are Impaired.

2. Section 1123(b)(2): Assumption, Assignment, and Rejection of Executory Contracts and Unexpired Leases.

51. Section 1123(b)(2) of the Bankruptcy Code permits a plan to provide for the assumption, assumption and assignment, or rejection of executory contracts and unexpired leases, subject to section 365 of the Bankruptcy Code. 11 U.S.C. § 1123(b)(2). Section 8 of the Plan addresses the assumption and rejection of executory contracts and unexpired leases, and satisfies the requirements of section 365(b) of the Bankruptcy Code. Consistent with section 1123(b)(2) of the Bankruptcy Code, Section 8.1 of the Plan provides that on the Effective Date,

except as otherwise provided in the Plan, each executory contract and unexpired lease not previously rejected, assumed, or assumed and assigned shall be deemed automatically rejected pursuant to sections 365 and 1123 of the Bankruptcy Code, unless such executory contract or unexpired lease (i) was previously assumed or rejected by the Debtors pursuant to an order of the Bankruptcy Court; (ii) previously expired or terminated pursuant to its own terms or by agreement of the parties thereto; (iii) is the subject of a motion to assume filed by the Debtors on or before the Confirmation Date; (iv) is by and between the Debtors and the Purchaser; (v) is identified in Section 8.3 or Section 8.4 of the Plan (*i.e.*, is an assumed insurance policy); or (v) is identified on the Assumption Schedule filed with the Plan Supplement. On December 4, 2020, the Debtors filed the Assumption Schedule that listed the contracts to be assumed by the Debtors on the Effective Date and the cure amounts to be paid on account of each assumed contract (the "**Cure Notice**"). *See* Plan Supplement, Exhibit C. The deadline for objections to any proposed assumption, cure amount, or adequate assurance of a contract identified on the Assumption Schedule was set for December 11, 2020. *See* Cure Notice. The time given to parties in interest to object to the assumption, assumption and assignment, and rejection of their executory contracts or expired leases was good and sufficient and no other or further notice is required. Certain parties filed objections relating to assumption and/or cure amounts. Although the Debtors have resolved some objections to date, the Debtors are still negotiating with contract counterparties to resolve other objections, which remain outstanding. To the extent that there are any unresolved objections as of the Effective Date, the Debtors and/or Plan Administrator will continue to work with the applicable parties to resolve the remaining objections.

3. Section 1123(b)(3): Settlement and Retention of Claims and Causes of Action.

a. Debtor Releases.

52. Pursuant to section 1123(b)(3)(A) of the Bankruptcy Code, a plan may "provide for the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A). As discussed in more detail below, Section 10.5 of the Plan provides for a release of certain Claims and Causes of Action owned by the Debtors, the Estates, or the Wind-Down Estates. *See* Plan, § 10.5. For the reasons set forth in Part II.B herein, these releases are permissible under, and consistent with, section 1123(b)(3)(A) of the Bankruptcy Code.

b. Retention of Causes of Action and Reservation of Rights.

53. Section 1123(b)(3)(B) of the Bankruptcy Code permits a chapter 11 plan to provide for the retention and enforcement of any claim or interest by the debtor, a trustee, or a representative of the estate. *See* 11 U.S.C. § 1123(b)(3)(B). Section 5.10 of the Plan provides that, except as provided in the Plan, the Confirmation Order, the Sale Order, or by another order of the Bankruptcy Court, the Debtors reserve any and all Causes of Action. *See* Plan, § 5.10. Prior to the Effective Date, the Debtors, and on and after the Effective Date, the Plan Administrator and the Wind-Down Estates, will retain, and will have the right to pursue, such Causes of Action. *See* Plan, § 5.10. Such Causes of Action include, but are not limited to, any actions specifically enumerated in the Schedule of Retained Causes of Action filed as part of the Plan Supplement. *See* Plan Supplement, Exhibit E. Furthermore, Section 6.15 of the Plan provides:

> [t]he Debtors, Wind-Down Estates or the Plan Administrator . . . may, but shall not be required to, set off or recoup against any Claim . . . any and all claims, rights, and Causes of Action . . . that the Debtors, the Wind-Down Estates or the Plan Administrator, as applicable, may have against the holder of such Claim . . . *provided*, that neither the failure [to setoff or recoup] nor the allowance of any Claim [under the Plan] shall constitute a waiver or release by a

> Debtor or its successor of any claims, rights, or Causes of Action . . . against the holder of such Claim.

Plan, § 6.15. Accordingly, the Plan is consistent with section 1123(b)(3)(B) of the Bankruptcy Code.

4. Section 1123(b)(4): Sale of Substantially all Assets.

54. Section 1123(b)(4) of the Bankruptcy Code provides that a plan may "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests." 11 U.S.C. § 1123(b)(4). The Plan does not provide for the sale of all or substantially all of the Debtors' property; rather, the Debtors' assets were sold to the Purchaser in connection with the Sale Transaction pursuant to section 363 of the Bankruptcy Code. *See* Sale Order; 11 U.S.C. § 363. Therefore, section 1123(b)(4) of the Bankruptcy Code is not applicable to the Plan.

5. Section 1123(b)(5): Modification of Rights.

55. Section 1123(b)(5) of the Bankruptcy Code permits a plan to modify or leave unaffected the rights of holders of any class of claims. *See* 11 U.S.C. § 1123(b)(5). In accordance and in compliance with section 1123(b)(5) of the Bankruptcy Code, the Plan properly modifies the rights of holders of Claims in Classes 4(a-e) (General Unsecured Claims against each Debtor), Classes 5(a-e) (Subordinated Securities Claims against each Debtor), Classes 6(a-d) (Intercompany Interests in each applicable Debtor), and Class 7(a) (Equity Interests in BSC). The Plan leaves unaffected the rights of holders of Claims in Classes 1(a-e) (Priority Tax Claims against each Debtor), Classes 2(a-e) (Priority Non-Tax Claims against each Debtor), and Classes 3(a-e) (Other Secured Claims against each Debtor). *See* Plan, §§ 3.2, 4. Thus, the Plan complies with section 1123(b)(5) of the Bankruptcy Code.

6. Section 1123(b)(6): Additional Plan Provisions.

56. Section 1123(b)(6) permits a plan to include "any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1123(b)(6). In accordance with section 1123(b)(6) of the Bankruptcy Code, the Plan contains certain releases and other provisions providing for settlements of claims and causes of action (including, but not limited, to provisions of the Global Settlement that were incorporated into the Plan). The permissive provisions of the Plan are appropriate and consistent with the applicable provisions of the Bankruptcy Code, thereby satisfying section 1123(b)(6) of the Bankruptcy Code. Accordingly, such provisions should be approved as explained in greater detail herein. *See, infra*, Part II.

E. Section 1123(c): Non-Debtor Proposed Sales—Inapplicable Provision.

57. The Debtors are not individuals. Accordingly, section 1123(c) of the Bankruptcy Code is inapplicable in these Chapter 11 Cases.

F. Section 1123(d): Cure of Defaults.

58. Section 1123(d) of the Bankruptcy Code provides that "if it is proposed in a plan to cure a default[,] the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law." 11 U.S.C. § 1123(d). Sections 8.1 and 8.2 of the Plan provide for the satisfaction of default Claims associated with each executory contract and unexpired lease to be assumed pursuant to the Plan in accordance with section 365(b)(1) of the Bankruptcy Code. All Cure Amounts will be determined in accordance with the underlying agreements and applicable non-bankruptcy law. Thus, the Plan complies with section 1123(d) of the Bankruptcy Code.

G. Section 1129(a)(2): The Debtors' Compliance with the Bankruptcy Code.

59. Section 1129(a)(2) of the Bankruptcy Code requires plan proponents to comply with the applicable provisions of the Bankruptcy Code. The legislative history to section 1129(a)(2) indicates that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code. *See* H.R. Rep. No. 95–595, at 412 (1977) ("Paragraph (2) [of section 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *see also In re Apex Oil*, 118 B.R. at 703 ("The principal purpose of [section 1129(a)(2)] is to assure that the plan proponent has complied with the disclosure requirements enumerated in 11 U.S.C. § 1125 in connection with the solicitation of acceptances to the plan."); 7 Collier On Bankruptcy, ¶ 1129.02, Lexis (20th ed. updated. 2020). The Debtors have complied with these provisions; *see also In re Star Ambulance Serv., LLC*, 540 B.R. 251, 262 (Bankr. S.D. Tex. 2015) ("Courts interpret [section 1129(a)(2)] to require that the plan proponent comply with the disclosure and solicitation requirements set forth in Bankruptcy Code §§ 1125 and 1126.").

1. Section 1125: Disclosure Statement and Solicitation.

60. Section 1125(b) of the Bankruptcy Code provides, in pertinent part, that:

> An acceptance or rejection of a plan may not be solicited after the commencement of [a] case under [the Bankruptcy Code] from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. . . .

11 U.S.C. § 1125(b).

61. By entry of the Solicitation Procedures Order on November 10, 2020, the Court approved the Disclosure Statement as containing "adequate information" pursuant to section 1125(b). As set forth in the Voting Certification, the Debtors solicited votes on the Plan from

holders of Claims in the Voting Classes consistent with the Solicitation Procedures Order. *See generally*, Voting Certification. In compliance with section 1125(b), the Debtors did not solicit acceptances of the Plan from any holder of a Claim or Interest prior to entry of the Solicitation Procedures Order. *See* Ficks Declaration, ¶ 10.

2. Section 1126: Acceptance of the Plan.

62. Section 1126 of the Bankruptcy Code sets forth the procedures for soliciting votes on a chapter 11 plan and determining acceptance thereof. Pursuant to section 1126, only holders of allowed claims or equity interests, as the case may be, in impaired classes of claims or equity interests that will receive or retain property under a plan on account of such claims or equity interests may vote to accept or reject such plan.[24]

63. As set forth in the Voting Certification, the Debtors solicited acceptances of the Plan from the holders of Claims against the Debtors in each Voting Class under the Plan in accordance with section 1126 of the Bankruptcy Code. The Voting Classes are Classes 4(a-e) (General Unsecured Claims against each Debtor).

64. In accordance with the Solicitation Procedures Order, the Debtors did not solicit votes for the Plan from any holder of Claims in Classes 1(a-e) (Priority Tax Claims against

[24] Section 1126 of the Bankruptcy Code provides, in pertinent parts, that:

> (a) The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan.
>
> * * *
>
> (f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.
>
> (g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests.

11 U.S.C. § 1126(a), (f), (g).

each Debtor), Classes 2(a-e) (Priority Non-Tax Claims against each Debtor), and Classes 3(a-e) (Other Secured Claims against each Debtor), as such Classes are Unimpaired and, therefore, deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. Further, the Debtors also did not solicit votes for the Plan by any holder of Claims or Interests, as applicable, in Classes 5(a-e) (Subordinated Securities Claims against each Debtor), Classes 6(a-d) (Intercompany Interests in each applicable Debtor), and Class 7(a) (Equity Interests in BSC), as such Classes of Interests will not receive or retain any property on account of their Claims or Interests and, therefore, are deemed not to have accepted the Plan pursuant to section 1126(g) of the Bankruptcy Code.

65. Section 1126(c) of the Bankruptcy Code specifies the requirements for acceptance of a plan by impaired classes of claims entitled to vote to accept or reject the plan:

> A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

11 U.S.C. § 1126(c).

66. All Voting Classes have voted, or are presumed, to accept the Plan in accordance with section 1126(c) of the Bankruptcy Code. *See generally*, Voting Certification.

67. The Debtors have complied with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, applicable non-bankruptcy law and the Solicitation Procedures Order in transmitting the Disclosure Statement, the Plan, the Plan Supplement, the Ballots, and related documents and notices, and in soliciting and tabulating votes on the Plan. Based upon the foregoing, the Debtors submit that the requirements of section 1129(a)(2) of the Bankruptcy Code have been satisfied.

H. Section 1129(a)(3): The Plan has been Proposed in Good Faith.

68. Section 1129(a)(3) of the Bankruptcy Code requires that a chapter 11 plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). While "good faith" is undefined by the Bankruptcy Code, "a plan is considered proposed in good faith 'if there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the Code.'" *In re Peabody Energy Corp.*, 933 F.3d 918, 927 (8th Cir. 2019) (quoting *Hanson*, 828 F.2d at 1315); *In re Union Fin. Servs.*, 303 B.R. at 419 (noting same); *see also In re PWS Holding Corp.*, 228 F.3d 224, 242 (3d. Cir. 2000) ("[F]or purposes of determining good faith under section 1129(a)(3) . . . the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code.").

69. Good faith for purposes of section 1129(a)(3) of the Bankruptcy Code is often found where a plan is the result of a debtor's arm's-length negotiations with creditors and is supported by key creditor constituencies. *See In re Union Fin. Servs.*, 303 B.R. at 419–20 (finding that the debtors' plan was proposed in good faith and that the fact that the "Unsecured Creditors' Committee fully support[ed] and endorse[d] confirmation of the Plan [. . . was] further evidence that the Plan has been proposed in good faith."); *In re Trans World Airlines*, 185 B.R. at 314 (finding that the debtor's plan was proposed in good faith in part due to the debtor's "diligent efforts to develop the Plan [and] its enduring commitment to negotiate its provisions with its creditors and stockholders").

70. Here, the Plan was proposed by the Debtors in good faith and for the legitimate and honest purpose of winding down the Debtors' business, liquidating each of the Debtors' Estates in a way that maximized the value of the Debtors' Estates, and distributing proceeds to creditors, consistent with the objectives and purposes of the Bankruptcy Code.

Furthermore, the Plan, and the acceptance thereof, is the culmination of the Debtors' extensive, arm's-length negotiations at different stages of these Chapter 11 Cases, including the Sale Transaction, the Global Settlement, and ultimately, the Plan. These negotiations at any point in time involved the Creditors' Committee (which acts as a fiduciary for all unsecured creditors in these cases), the PBGC, the DIP Lenders, and other parties in interest, all of whom were represented by sophisticated counsel. The Debtors' good faith is evident from the facts and record of these Chapter 11 Cases, including the declarations and other pleadings filed in support of approval of the Sale Transaction, the Global Settlement, and the confirmation of the Plan.

71. Accordingly, the Debtors have proposed the Plan in good faith in compliance with section 1129(a)(3) of the Bankruptcy Code.

I. Section 1129(a)(4): The Plan Provides that Fee Claims are Subject to Court Approval.

72. Section 1129(a)(4) of the Bankruptcy Code requires that "[a]ny payment made or to be made by the [plan] proponent . . . for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable." 11 U.S.C. § 1129(a)(4). Section 1129(a)(4) of the Bankruptcy Code has been construed to require that all payments of professional fees that are made from estate assets be subject to review and approval as to their reasonableness by the court. *In re Apex Oil*, 118 B.R. at 704 (stating that a plan satisfies section 1129(a)(4) when it provides that "any payment that is to be made or fixed after confirmation is subject to the approval of the Court as reasonable.").

73. Any payment made[25] or to be made by any of the Debtors or the Wind-Down Estates, as applicable, for services or for costs and expenses incurred from the Petition Date through the Effective Date,[26] in connection with the Chapter 11 Cases, or in connection with the Plan and incident to the Chapter 11 Cases, has been approved by, or is subject to the approval of, the Court as reasonable. Specifically, Section 2.2 of the Plan subjects payment of all Fee Claims[27] to the filing and approval of final fee applications by such entities seeking allowance of compensation for services rendered and/or reimbursement of expenses incurred from the Petition Date through the Effective Date. *See* Plan, ¶ 2.2. Further, Section 11.1(h) of the Plan provides that the Court shall retain jurisdiction to hear and determine all applications to approve Fee Claims. *See* Plan, ¶ 11.1(h). Based on the foregoing, the Plan complies with the requirements of section 1129(a)(4) of the Bankruptcy Code.

J. Section 1129(a)(5): The Debtors have Disclosed all Necessary Information Regarding Directors, Officers, and Insiders.

74. Section 1129(a)(5) of the Bankruptcy Code requires that the proponent of a plan disclose the identity and affiliations of the proposed officers and directors of the successor to the debtors under the plan; that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy; and,

[25] Throughout the course of these Chapter 11 Cases, professionals have served monthly fee statements on the U.S. Trustee and other parties in interest, in accordance with the Local Rules, for approval and payment of 80% of fees and 100% of expenses, subject to the remaining 20% of fees being submitted for approval and payment in the final application. *See* L.R. §§ 2016-1, 2016-2

[26] The Plan provides that payments made on or after the Effective Date for services rendered or reimbursement of expenses incurred after the Effective Date may be paid by the Debtors, the Wind-Down Estates, or the Plan Administrator, as applicable, in the ordinary course and without the need for any Bankruptcy Court approval. *See* Plan, § 2.2(d).

[27] Pursuant to the Plan, the term "Fee Claim" means "a Claim for professional services rendered or costs incurred on or after the Petition Date through the Effective Date by professional persons retained by the Debtors or the Creditors' Committee pursuant to sections 327, 328, 329, 330, 331, 503(b) or 1103 of the Bankruptcy Code in the Chapter 11 Cases." Plan, § 1.53.

to the extent that there are any insiders that will be retained or employed by the successors to the debtors, that there be disclosure of the identity and nature of any compensation of any such insiders. *See* 11 U.S.C. § 1129(a)(5). If, at the time of confirmation, the debtor is unable to identify these individuals by name a debtor still satisfies this requirement so long as directors will be appointed consistent with the company's organizational documents and applicable state and federal law. *See, e.g.*, *In re Oaks*, No. 11-48903, 2012 WL 5717940, at *11 (Bankr. N.D. Ill. Nov. 15, 2012) (debtor satisfied section 1129(a)(5) by disclosing the identity and affiliations of any individual proposed to serve as a director or officer through its plan supplement)*; JP Morgan Chase Bank, N.A., v. Charter Commc'ns Operating, LLC* (*In re Charter Commc'ns*), 419 B.R. 221, 260 n.30 (Bankr. S.D.N.Y. 2009) (emphasis in original) ("Although section 1129(a)(5) requires the plan to identify all directors of the reorganized entity, that provision is satisfied by the Debtors' disclosure at this time of the identities of the *known* directors."); *In re Am. Solar King Corp.*, 90 B.R. 808, 815 (Bankr. W.D. Tex. 1988) ("The subsection does not (and cannot) compel the debtor to do the impossible, however. If there is no proposed slate of directors as yet, there is simply nothing further for the debtor to disclose under subsection (a)(5)(A)(i).").

75. As disclosed in the Plan Supplement, the Creditors' Committee and the Debtors, as applicable, have proposed that the initial director and officer of the Wind-Down Estates will be Alan D. Halperin, who will also serve as the Plan Administrator. *See* Plan Supplement, Exhibit B.

K. Section 1129(a)(7): The Plan is in the Best Interests of All Creditors and Interest Holders.

76. Section 1129(a)(7) of the Bankruptcy Code requires that a plan be in the best interests of creditors and equity holders. *See* 11 U.S.C. § 1129(a)(7). This requirement is commonly referred to as the "best interests" test. The best interests test requires that each holder

of a claim or equity interest either accept the plan or receive or retain under the plan property having a present value, as of the effective date of the plan, not less than the amount such holder would receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code. *See* 11 U.S.C. § 1129(a)(7); *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999) ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."). The best interests test is generally satisfied through a liquidation recovery analysis. *See, e.g.*, *In re Apex Oil*, 118 B.R. at 705 (finding that a plan satisfies the best interests of creditors test when "the Debtors have established that their liquidation analysis accounts for all material quantifiable assets and liabilities that reasonably can be quantified and analyzed for purposes of applying the 'best interest of creditors' test'"); *In re Affiliated Foods, Inc.*, 249 B.R. 770, 787 (Bankr. W.D. Mo. 2000) ("Applying the best interests of creditors test requires the Court to 'conjure up a hypothetical chapter 7 liquidation that would be conducted on the effective date of the plan.'") (citing *In re Sierra–Cal*, 210 B.R. 168, 172 (Bankr. E.D. Cal. 1997)); *In re Jartran, Inc.*, 44 B.R. 331, 389–93 (Bankr. N.D. Ill. 1984) (conducting a liquidation analysis to determine if 1129(a)(7) is satisfied).

77. Here, under the "best interests of creditors" test, each impaired Class of Claims or Interests shall receive or retain property with a value not less than the value it would receive if the debtor liquidated under chapter 7 of the Bankruptcy Code. As set forth in the Ficks Declaration, a liquidation under chapter 7 would have reduced net proceeds available to holders of Claims[28] by $13.0 million in a high liquidation value scenario and by $9.5 in a low liquidation value scenario. Ficks Declaration, ¶ 34. Furthermore, the relative recoveries of holders of Claims or Interests under the Plan and in a hypothetical chapter 7 liquidation are set forth in Exhibit B to

[28] Excluding the PBGC, which agreed to lesser treatment and has voted to accept the Plan.

the Disclosure Statement (the "**Liquidation Analysis**"). They demonstrate that the holders in each Class of Claims and Interests will receive at least as much value under the Plan as they would in a hypothetical liquidation of the Debtors on the Effective Date. Specifically, at the time of filing the Disclosure Statement, the Debtors estimated that the proceeds available for distribution in a hypothetical chapter 7 liquidation would result in approximately the following projected recoveries to each Class:

Class	Type of Claim or Interest	Liquidation Recovery	Plan Recovery (Prior to PBGC Subordination)[29]
1(a)	Priority Tax Claims against BSC	100%	100%
1(b)	Priority Tax Claims against BGI	100%	100%
1(c)	Priority Tax Claims against ABI	100%	100%
1(d)	Priority Tax Claims against BSI	100%	100%
1(e)	Priority Tax Claims against BST	100%	100%
2(a)	Priority Non-Tax Claims against BSC	100%	100%
2(b)	Priority Non-Tax Claims against BGI	100%	100%
2(c)	Priority Non-Tax Claims against ABI	100%	100%
2(d)	Priority Non-Tax Claims against BSI	100%	100%
2(e)	Priority Non-Tax Claims against BST	100%	100%
3(a)	Other Secured Claims against BSC	100%	100%
3(b)	Other Secured Claims against BGI	100%	100%
3(c)	Other Secured Claims against ABI	100%	100%
3(d)	Other Secured Claims against BSI	100%	100%
3(e)	Other Secured Claims against BST	100%	100%
4(a)	General Unsecured Claims against BSC	4.7% - 6.7%	5.4% - 7.5%
4(b)	General Unsecured Claims against BGI	1.1% - 1.4%	1.2% - 1.6%
4(c)	General Unsecured Claims against ABI	0.9% - 1.2%	1.0% - 1.3%
4(d)	General Unsecured Claims against BSI	1.2% - 1.7%	1.4% - 1.8%
4(e)	General Unsecured Claims against BST	0.4% - 0.5%	0.4% - 0.5%
5(a)	Subordinated Securities Claims against BSC	0%	0%
5(b)	Subordinated Securities Claims against BGI	0%	0%
5(c)	Subordinated Securities Claims against ABI	0%	0%
5(d)	Subordinated Securities Claims against BSI	0%	0%
5(e)	Subordinated Securities Claims against BST	0%	0%
6(a)	Intercompany Interests in BGI	0%	0%
6(b)	Intercompany Interests in ABI	0%	0%
6(c)	Intercompany Interests in BSI	0%	0%
6(d)	Intercompany Interests in BST	0%	0%
7(a)	Equity Interests in BSC	0%	0%

78. These projections are based on reasonable, justified, and widely accepted assumptions regarding a chapter 7 trustee's ability to liquidate the Debtors' assets and the values that such sales would be likely to produce. The Liquidation Analysis provided with the Disclosure Statement, the Ficks Declaration, and other evidence proffered or adduced at the Confirmation

[29] The PBGC Subordination increases the projected recoveries under the Plan for General Unsecured Claims that are not PBGC Allowed General Unsecured Claims (while decreasing the projected recoveries for the PBGC Allowed General Unsecured Claims). *See generally*, Liquidation Analysis.

Hearing (i) are persuasive and credible, (ii) have not been controverted by other evidence, and (iii) establish that each holder of an Impaired Claim or Interest either has accepted the Plan or will receive or retain under the Plan, on account of such Claim or Interest, property of a value, as of the Effective Date, that is not less than the amount that such holder would receive or retain if the Debtors were liquidated under chapter 7 of the Bankruptcy Code on such date.

79. As set forth in the Ficks Declaration, the Liquidation Analysis provides a fair and reasonable assessment of the effects that a conversion of the Debtors' Chapter 11 Cases to cases under chapter 7 of the Bankruptcy Code would have on the proceeds available for distribution to holders of Claims and Interests of the Debtors, based upon the knowledge and expertise of the Debtors' advisors. *See* Ficks Declaration, ¶¶ 31-32. Accordingly, the Plan satisfies the requirements of 1129(a)(7) of the Bankruptcy Code and is in the best interests of all creditors.

L. Section 1129(a)(8): The Plan Has Been Accepted by Impaired Classes Entitled to Vote.

80. Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests either accept the plan or not be impaired by the plan. *See* 11 U.S.C. § 1129(a)(8). As set forth above, the holders of Claims or Interests in Classes 1(a-e) (Priority Tax Claims against each Debtor), Classes 2(a-e) (Priority Non-Tax Claims against each Debtor), and Classes 3(a-e) (Other Secured Claims against each Debtor) are unimpaired under the Plan within the meaning of section 1124 of the Bankruptcy Code and are conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. Holders of Claims or Interests in Classes 4(a-e) (General Unsecured Claims against each Debtor) are impaired under the Plan and all of those Classes voted to accept the plan, satisfying Section 1129(a)(8) of the Bankruptcy Code.

81. Section 1126 of the Bankruptcy Code provides that a plan is accepted by an impaired class of claims if the accepting class members hold at least two-thirds in amount and more than one-half in number of the claims in their respective class that have voted. 11 U.S.C. § 1126(c). As reflected in the Voting Certification, each of the Voting Classes has voted to accept the Plan in accordance with section 1126(c) of the Bankruptcy Code.

M. Section 1129(a)(9): The Plan Provides for Payment in Full of All Allowed Priority Claims.

82. Section 1129(a)(9) of the Bankruptcy Code requires that persons holding allowed claims entitled to priority under section 507(a) receive specified cash payments under the plan. *See* 11 U.S.C. § 1129(a)(9). Unless the holder of a particular claim agrees to a different treatment with respect to such claim, section 1129(a)(9) of the Bankruptcy Code sets forth the treatment the plan must provide.

83. The treatment of Allowed Administrative Expense Claims and Fee Claims pursuant to Sections 2.1 and 2.2, respectively, of the Plan satisfies the requirements of section 1129(a)(9)(A) of the Bankruptcy Code. The treatment of Other Priority Claims pursuant to Section IV of the Plan satisfies the requirements of section 1129(a)(9)(B) of the Bankruptcy Code. The treatment of Priority Tax Claims pursuant to Sections 4.1-4.5 of the Plan satisfies the requirements of section 1129(a)(9)(C) of the Bankruptcy Code. As set forth in the Ficks Declaration, the Debtors have sufficient Cash to pay Allowed Administrative Expense Claims, Fee Claims, Other Priority Claims, and Priority Tax Claims. Accordingly, the Plan satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code.

N. Section 1129(a)(10): Acceptance of the Plan by an Impaired Class.

84. Section 1129(a)(10) of the Bankruptcy Code requires the affirmative acceptance of a plan by at least one class of impaired claims, "determined without including any

acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10). The Voting Classes are Impaired Classes, and each Voting Class has voted to accept the Plan. Accordingly, at least one Class of Claims against the Debtors that is Impaired under the Plan has voted to accept the Plan by the requisite majorities, determined without including any acceptance of the Plan by any insider in such Classes, as set forth in the Voting Certification, thereby satisfying the requirements of section 1129(a)(10) of the Bankruptcy Code. *See* Voting Certification.

O. Section 1129(a)(11): The Plan is Feasible.

85. Section 1129(a)(11) of the Bankruptcy Code requires the bankruptcy court to determine that a plan is feasible as a condition precedent to confirmation. *See* 11 U.S.C. § 1129(a)(11). Specifically, the provision requires that confirmation is not likely to be followed by liquidation or the need for further financial reorganization of the Debtors or any successor to the Debtors, unless such liquidation or further financial reorganization is proposed in the plan. The feasibility test set forth in section 1129(a)(11) of the Bankruptcy Code requires the Court to determine whether the Plan may be implemented and has a reasonable likelihood of success. *See, e.g.*, *In re Danny Thomas Props. II Ltd. P'ship*, 241 F.3d 959, 963 (8th Cir. 2001) ("[T]he bankruptcy court cannot approve a plan unless it has at least a reasonable prospect for success."); *Prudential Ins. Co. of Am. v. Monner* (*In re Monnier Bros.*), 755 F.2d 1336, 1341 (8th Cir. 1985) ("In determining whether [a plan] is feasible, the bankruptcy court has an obligation to scrutinize the plan carefully to determine whether it offers a reasonable prospect of success and is workable.") (alteration in original); *see also Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988) ("the feasibility standard is whether the plan offers a reasonable assurance of success . . . [s]uccess need not be guaranteed"). Further, "[f]easibility determinations must be 'firmly rooted in predictions based on objective fact.'" *In re Danny Thomas Props.*, 241 F.3d at 964 (citing *In re*

Clarkson, 767 F.2d 417, 420 (8th Cir. 1985)). As described below, the Plan is feasible in accordance with section 1129(a)(11) of the Bankruptcy Code.

86. The key element of feasibility is whether there is a reasonable probability that the provisions of the plan can be performed. As noted by the United States Court of Appeals for the Ninth Circuit: "The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation." *See Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw., Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985); *see also In re W.R. Grace & Co.*, 475 B.R. 34, 114 (D. Del. 2012) (same). Clearly, the Plan does not contain any visionary scheme, but is rather a practical plan for the orderly wind-down and liquidation of the Debtors' Estates. Moreover, "just as speculative prospects of success cannot sustain feasibility, speculative prospects of failure cannot defeat feasibility. The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds." *In re Cajun Elec. Power Coop., Inc.*, 230 B.R. 715, 745 (Bankr. M.D. La. 1999); *see also In re U.S. Truck Co.*, 47 B.R. 932, 944 (E.D. Mich. 1985), *aff'd*, 800 F.2d 581 (6th Cir. 1986); *In re Paragon Offshore PLC*, No. 16-10386 (CSS), 2016 WL 6699318, at *16 (Bankr. D. Del. Nov. 15, 2016) (internal quotations and citations omitted) ("The [d]ebtors are not required to view [their] business and economic prospects in the worst possible light.").

87. The Debtors are confident that they are able to fulfill their obligations under the Plan and satisfy their estimated administration costs. Under the Plan, the Debtors will be able to satisfy the conditions precedent to the Effective Date.[30] On the Effective Date, the Debtors

[30] Section 9.1 of the Plan provides the conditions precedent to the Effective Date, which are as follows: (a) the Bankruptcy Court shall have entered the Confirmation Order, the Confirmation Date shall have occurred, and no stay of the Confirmation Order shall be in effect; (b) all governmental approvals, if any, necessary to consummate the Plan and the transactions contemplated hereby shall have been obtained or otherwise waived; (c) all actions, documents

estimate that they will have approximately $105 million available for distribution, prior to making any distributions. This amount is more than enough to pay all Wind-Down Costs, Administrative Claims, and Priority Claims, even if those are allowed at the greatest potential amounts (*i.e.*, if any general unsecured claims, for which claimants filed proofs of claims asserting higher priority, are deemed to be administrative claims or other higher priority claims). The Debtors will also have sufficient funds to meet their post-Effective Date obligations, including, but not limited to, the costs associated with the Plan Administrator's administration and implementation of the Plan. The Plan is straightforward and provides for payment in full of all Allowed Administrative Expense Claims, Allowed Priority Tax Claims, Allowed Priority Non-Tax Claims, and Allowed Other Secured Claims, as well as for distributions to certain holders of Claims pursuant to the Plan and the disposition of the Debtors' remaining assets. The Plan provides various mechanisms for accomplishing all of these objectives, including the appointment of the Plan Administrator. Accordingly, the information in the Disclosure Statement, the Ficks Declaration, and the evidence proffered or adduced at the Confirmation Hearing (i) are persuasive and credible, (ii) have not been controverted by other evidence, and (iii) establishes that the Plan is feasible and provides adequate and appropriate means for its implementation and an orderly wind down and liquidation

---

and agreements necessary to implement the Plan and the transactions and other matters contemplated thereby shall have been effected or executed by all Entities party thereto, and all conditions precedent to the effectiveness of such documents and agreements shall have been satisfied or waived pursuant to the terms of such documents or agreements; (d) the Debtors shall establish and fund the Professional Fees Escrow Account, as set forth in Section 2.2 of the Plan; (e) the Debtors shall estimate and reserve the Wind-Down Budget for the purpose of adequately funding the Wind-Down; (f) the Plan shall not have been materially amended, altered or modified from the Plan confirmed by the Confirmation Order, unless such material amendment, alternation, or modification has been made with the reasonable consent of the Creditors' Committee; (g) notwithstanding when a condition precedent to the Effective Date occurs, for purposes of the Plan, such condition precedent shall be deemed to have occurred simultaneously upon the completion of the applicable conditions precedent to the Effective Date; *provided*, that to the extent a condition precedent (a "**Prerequisite Condition**") may be required to occur prior to another condition precedent (a "**Subsequent Condition**") then, for purposes of the Plan, the Prerequisite Condition shall be deemed to have occurred immediately prior to a Subsequent Condition regardless of when such Prerequisite Condition or Subsequent Condition shall have occurred. *See* Plan, § 9.1.

of the Debtors' Estates, as contemplated by the Plan, thereby satisfying the requirements of section 1129(a)(11) of the Bankruptcy Code.

P. Section 1129(a)(12): All Statutory Fees Have or Will be Paid.

88. Section 1129(a)(12) requires the payment of "[a]ll fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan " 11 U.S.C. § 1129(a)(12). Section 507 of the Bankruptcy Code provides that "any fees and charges assessed against the estate under [section 1930] of title 28" are afforded priority as administrative expenses. 11 U.S.C. § 507(a)(2). The Plan provides that all fees payable pursuant to § 3717 of title 31 of the United States Code, as determined by the Court, have been or will be paid on or before the Effective Date pursuant to Section 12.1 of the Plan, thereby satisfying the requirements of sections 507 and 1129(a)(12) of the Bankruptcy Code.

Q. Section 1129(a)(13): Retiree Benefits.

89. Section 1129(a)(13) of the Bankruptcy Code requires that retiree benefits[31] are paid post-confirmation at levels established in accordance with section 1114 of the Bankruptcy Code. *See* 11 U.S.C. § 1129(a)(13). Historically, the Debtors maintained certain retiree benefits under the Group Insurance Plan for Retirees of Briggs & Stratton Corporation, Plan Number 502 (the "**Retiree Group Insurance Plan**").[32] Leading up to the Debtors' chapter 11 cases, on July 19, 2020, the Board of Directors of Briggs (the "**Board**") exercised Briggs's right to terminate the

[31] Pursuant to section 1114 of the Bankruptcy Code, the term "retiree benefits" means "payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title." 11 U.S.C. § 1114(a).

[32] *See Declaration of Rachele Lehr in Support of the Debtors' Motion for Order (I) Confirming Inapplicability of Section 1114 of the Bankruptcy Code; (II) In the Alternative, Approving Debtors' Prepetition Termination of Retiree Benefits Pursuant to Section 1114(L) of the Bankruptcy Code; and (III) Granting Related Relief* [Docket No. 44-1], ¶ 5.

Retiree Group Insurance Plan. On August 24, 2020, this Court entered an order (i) ratifying the termination of the Retiree Group Insurance Plan and (ii) confirming the inapplicability of section 1114 of the Bankruptcy Code to the Debtors' prepetition termination of those retiree benefits.[33] The Debtors do not believe that they currently maintain or formerly maintained any other benefits that would be subject to section 1114 of the Bankruptcy Code. *See* Ficks Declaration, ¶ 40. Accordingly, the Plan satisfies section 1129(a)(13) of the Bankruptcy Code.

R. Section 1129(a)(6), 1129(a)(14), 1129(a)(15), 1129(a)(16), and 1129(e): Inapplicable Provisions.

90. Section 1129(a)(6) of the Bankruptcy Code provides that "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." 11 U.S.C. § 1129(a)(6). The Plan does not provide for rate changes by the Debtors. Accordingly, the Debtors submit that section 1129(a)(6) of the Bankruptcy Code is not applicable to these Chapter 11 Cases.

91. Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations. *See* 11 U.S.C. § 1129(a)(14). The Debtors are not required by a judicial or administrative order, or by statute, to pay a domestic support obligation. Accordingly, section 1129(a)(14) of the Bankruptcy Code is inapplicable in these Chapter 11 Cases.

92. Section 1129(a)(15) of the Bankruptcy Code applies only in cases in which the debtor is an "individual" (as that term is defined in the Bankruptcy Code). *See* 11 U.S.C. § 1129(a)(15). The Debtors are not "individuals" and, accordingly, section 1129(a)(15) of the Bankruptcy Code is inapplicable in these Chapter 11 Cases.

[33] *See Order (I) Confirming the Inapplicability of Section 1114 of the Bankruptcy Code to the Debtors' Prepetition Termination of Retiree Benefits; and (II) Granting Related Relief* [Docket No. 567].

93. Section 1129(a)(16) of the Bankruptcy Code applies to transfers of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust. *See* 11 U.S.C. § 1129(a)(15). The Debtors are each a moneyed, business, or commercial corporation and, accordingly, section 1129(a)(16) is inapplicable.

94. Section 1129(e) of the Bankruptcy Code applies only to "small business case[s]." 11 U.S.C. § 1129(e). None of these Chapter 11 Cases are a "small business case," as that term is defined in the Bankruptcy Code, and, accordingly, section 1129(e) of the Bankruptcy Code is inapplicable.

S. Section 1129(b): The Plan Satisfies the "Cram Down" Requirements with Respect to the Rejecting Classes.

95. Section 1129(b) of the Bankruptcy Code provides a mechanism for the confirmation of a chapter 11 plan in circumstances where not all impaired classes of claims and interests accept such chapter 11 plan, as required by section 1129(a)(8) of the Bankruptcy Code. *See* 11 U.S.C. § 1129(b). This mechanism is colloquially known as "cram down." In these Chapter 11 Cases, each Voting Class has voted to accept the Plan. Furthermore, the Unimpaired Classes are deemed to accept the Plan. Therefore, section 1129(b) of the Bankruptcy Code is inapplicable to the Voting and Unimpaired Classes in these Chapter 11 Cases.

96. The Debtors' Plan provides that Classes 5(a-e), 6(a-d), and 7(a) (the Deemed Rejecting Classes) are deemed to reject the Plan and were not entitled to vote on the Plan. Section 1129(b) of the Bankruptcy Code provides in pertinent part that:

> [I]f all of the applicable requirements of [section 1129(a) of the Bankruptcy Code] other than [the requirement contained in section 1129(a)(8) that a plan must be accepted by all impaired classes] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b)(1). Thus, under section 1129(b) of the Bankruptcy Code, a bankruptcy court may "cram down" a plan over the rejection or deemed rejection of a plan by impaired class or classes of claims or interests as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such rejecting class or classes.

97. The Plan does not "discriminate unfairly" and is "fair and equitable" with respect to the Deemed Rejecting Classes as no Class senior to any Deemed Rejecting Class is being paid more than in full and the Plan does not provide a recovery on account of any Claim or Interest that is equal or junior to Claims in such Deemed Rejecting Classes. Thus, the Plan may be confirmed notwithstanding the Deemed Rejecting Classes.

1. The Plan Does Not Discriminate Unfairly.

98. The unfair discrimination standard of section 1129(b) ensures that a plan does not unfairly discriminate against a dissenting class with respect to the value the dissenting class will receive under a plan when compared to the value given to all other similarly situated classes. The Bankruptcy Code itself does not define "unfair discrimination." Rather, courts examine the facts and circumstances of the particular case. *See, e.g.*, *In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (stating a court should "consider all aspects of the case and the totality of all the circumstances"); *In re Aztec Co.*, 107 B.R. 585, 589 (Bankr. M.D. Tenn. 1989) (noting courts "have recognized the need to consider the facts and circumstances of each case to give meaning to the proscription against unfair discrimination"). At a minimum, however, a "plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if similar claims are treated differently without a reasonable basis for the disparate treatment." *In re Union Fin. Servs. Grp., Inc.*, 303 B.R. 390, 421 (Bankr. E.D. Mo. 2003); *see also Aztec*, 107 B.R. at 589–91. A "plan unfairly discriminates . . . only if similar[ly-situated classes] are treated differently without a reasonable basis for the disparate treatment." *Union Fin. Servs.*, 303 B.R. at

421; *see also In re Armstrong World Indus., Inc.*, 348 B.R. 111, 121 (D. Del. 2006) (noting that "hallmarks of the various tests have been whether there is a reasonable basis for the discrimination, and whether the debtor can confirm and consummate a plan without the proposed discrimination.") (citations omitted); *In re WorldCom Inc.*, No. 02-13533 (AJG), 2003 WL 23861928, at *59 (Bankr. S.D.N.Y. Oct. 31, 2003) (citations omitted).

99. The unfair discrimination requirement, which involves a comparison of classes, is distinct from the equal treatment requirement of section 1123(a)(4) of the Bankruptcy Code, which involves a comparison of the treatment of claims within a particular class.

100. As stated above, with respect to the Deemed Rejecting Classes, no other Classes of equal priority are provided a recovery under the Plan. Accordingly, there is no presumption of unfair discrimination with respect to these Classes and the Plan does not "discriminate unfairly" with respect to any Impaired Classes of Claims or Interests.

2. The Plan is Fair and Equitable.

101. Pursuant to section 1129(b)(2) of the Bankruptcy Code, a plan must be fair and equitable with respect to each class that rejects such plan. The definition of "fair and equitable" varies based on the priority of the claims or interest of such rejecting class. Section 1129(b)(2)(B)(ii) of the Bankruptcy Code provides that a plan is fair and equitable with respect to a class of impaired unsecured claims that did not accept such plan if, pursuant to the plan, no holder of a claim or interest that is junior to the interests of such class will receive or retain any property on account of their junior interest. *See* 11 U.S.C. § 1129(b)(2)(B)(ii). Similarly, section 1129(b)(2)(C)(ii) of the Bankruptcy Code provides that a plan is fair and equitable with respect to a class of impaired interests that did not accept the plan if, pursuant to the plan, no holder of an interest that is junior to the interests of such class will receive or retain any property on account of their junior interest. 11 U.S.C. § 1129(b)(2)(C)(ii). These requirements are often referred to as

the "absolute priority rule." *See also Union Fin. Servs.*, 303 B.R. at 423. In other words, a plan is "fair and equitable" with respect to an impaired class of claims or interests that rejects a plan if it follows the "absolute priority" rule. *See* 11 U.S.C. § 1129(b); *203 N. LaSalle St. P'ship*, 526 U.S. at 441-42; *Union Fin. Servs.*, 303 B.R. at 423. The rule mandates that a junior class of claims cannot receive a distribution under the plan unless senior classes are rendered unimpaired or give their consent. 11 U.S.C. § 1129(b).

102. Distributions under the Plan are made in the order of priority prescribed by the Bankruptcy Code and in accordance with the absolute priority rule. With respect to the Deemed Rejecting Classes, no Claims or Interests junior to these Classes will receive recoveries under the Plan on account of such Claims or Interests. Specifically, the Deemed Rejecting Classes will not recover or retain any property on account of their respective Interests and Claims under the Plan. Accordingly, the Plan is "fair and equitable" and, therefore, satisfies section 1129(b) of the Bankruptcy Code.

T. Section 1129(c): The Plan is the Only Plan.

103. The Plan is the only plan filed in each of these Chapter 11 Cases and, accordingly, section 1129(c) of the Bankruptcy Code is satisfied in these Chapter 11 Cases.

U. Section 1129(d): The Principal Purpose of the Plan is not the Avoidance of Taxes.

104. The principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act, and no governmental entity has objected to the confirmation of the Plan on any such grounds. *See* Ficks Declaration ¶ 46. The Plan, therefore, satisfies the requirements of section 1129(d) of the Bankruptcy Code.

V. Section 1127: Modification of the Plan.

105. Pursuant to section 1127 of the Bankruptcy Code, a plan proponent may modify a plan at any time before confirmation so long as the plan, as modified, satisfies the requirements of sections 1122 and 1123 of the Bankruptcy Code and the proponent of the modification complies with section 1125 of the Bankruptcy Code. In addition, with respect to modifications made after acceptance but prior to confirmation of the plan, Bankruptcy Rule 3019 provides, in relevant part:

> [A]fter a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

Fed. R. Bankr. P. 3019(a).

106. The Debtors modified the Plan on December 16, 2020, among other things, to resolve certain Objections and informal comments received by the Debtors. First, the Debtors made certain technical modifications to clarify the treatment of Insured Claims under the Plan. Second, the Debtors, in consultation with the Creditors' Committee, modified and clarified the insurance neutrality provision in the Plan, and certain related sections, in response to the Objection filed by the Objecting Insurers and to certain informal comments from other insurers. These changes resolved all of the issues raised by the Objecting Insurers and all informal comments from other insurers. Lastly, the Debtors made certain clean-up changes to address certain minor internal inconsistencies within the Plan and the Plan Administrator Agreement.

107. As described above, the Plan, as modified, complies with sections 1122 and 1123 of the Bankruptcy Code, and the Debtors have complied with section 1125 of the Bankruptcy

Code. Accordingly, the requirements of section 1127 have been satisfied. Moreover, Bankruptcy Rule 3019 is satisfied because the modifications do not "adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification." Fed. R. Bankr. P. 3019(a).

II. SETTLEMENTS AND COMPROMISES EMBODIED IN PLAN ARE INTEGRAL COMPONENTS OF PLAN AND SHOULD BE APPROVED.

108. The Plan embodies certain settlements and compromises of Claims, Interests, and controversies relating to the contractual, legal, and subordination rights of creditors or Interest holders with respect to Allowed Claims or Interests or any distribution to be made on account thereof. The Debtors respectfully submit that the Court should approve such settlements and compromises, including, but not limited to, the Global Settlement (as incorporated in the Plan) and the Releases, pursuant to sections 1123(b)(6) and 1123(b)(A) of the Bankruptcy Code, as applicable.

109. The standard for evaluating the validity of a settlement contained in a chapter 11 plan is the same as the standard for evaluating a settlement between a debtor and another party outside the context of a plan. Stated differently, the settlement provisions in a chapter 11 plan must satisfy the standards used to evaluate settlements under Bankruptcy Rule 9019. *See In re Wigley*, 557 B.R. 678, 685 (B.A.P. 8th Cir. 2016) ("The standard for approving settlements as part of a plan of reorganization are the same as the standards for approving settlements under Fed. R. Bankr. P. 9019); *see also* Fed. R. Bankr. P. 9019.

110. "In the Eighth Circuit, the standard for evaluation of a settlement 'is whether the settlement is fair and equitable and in the best interests of the estate.'" *In re Wigley*, 557 B.R. at 685 (quoting *Tri–State Fin., LLC v. Lovald*, 525 F.3d 649, 654 (8th Cir. 2008)). "A settlement need not be perfect. Instead, the bankruptcy court must 'determine that the settlement does not

fall below the lowest point in the range of reasonableness.'" *In re Wigley*, 557 B.R. at 685 (citing *Tri-State Fin.*, 525 F.3d at 654); *see also In re Martin*, 212 B.R. 316, 319 (B.A.P. 8th Cir. 1997) (noting that "[t]he court does not substitute its judgment for that of the trustee, but reviews the issues to see if the settlement falls below the lowest point of reasonableness."). Indeed, when considering a settlement, the Court "need only canvas the issues" to reach an "'informed and independent' judgment" regarding whether or not the settlement is in the best interests of the estate. *See In re Apex Oil Co.*, 92 B.R. 847, 867 (Bankr. E.D. Mo. 1988).

111. Courts in the Eighth Circuit look to the *Drexel* factors[34] to determine if a settlement is reasonable. *See, e.g., In re Wigley*, 557 B.R. at 685 (citing *Tri–State Fin.*, 525 F.3d at 654); *In re Petters Co., Inc.*, 455 B.R. 166, 175 (B.A.P. 8th Cir. 2011); *In re Flight Transp. Corp. Sec. Litig.*, 730 F.2d 1128, 1135 (8th Cir. 1984). These factors include: "(a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises." *Drexel v. Loomis*, 35 F.2d at 806. Furthermore, a bankruptcy court may approve a settlement "over the objection of some parties, so long as a settlement is found to be in the best interests of the estate as a whole." *In re Wigley*, 557 B.R. at 686 (quoting *In re Flight Transp. Corp.*, 730 F. 2d at 1138.

112. As described below, the settlements and compromises incorporated in the Plan in this case, including the Global Settlement and the Debtors' Releases, should be approved because they are fair and equitable, and in the best interest of the Debtors' estates as a whole.

[34] *See Drexel v. Loomis*, 35 F.2d 800, 806 (8th Cir. 1929).

A. The Global Settlement.

113. The Debtors submit that the Global Settlement should be approved. The Global Settlement is the result of good-faith, arm's-length negotiations with the Creditors' Committee, the PBGC, the Purchaser, the Prepetition Secured Parties,[35] and various other creditor constituencies of the Debtors, which resulted in, among other things, the PBGC Subordination, reduced claim amounts of the PBGC and DIP Lenders, and the compromise and settlement of certain Causes of Action. *See* Ficks Decl. ¶¶ 7-8. The Global Settlement helped facilitate the consummation of a value-maximizing sale transaction for creditors, as it resulted in the Creditors' Committee's, the ad hoc group of unsecured noteholders, and the PBGC's support for the Sale Transaction. The Global Settlement also helped the Debtors and other parties in interest avoid costly litigation and delay, thereby conserving estate resources for an efficient plan process and distributions to creditors. With respect to the paramount interest of creditors prong of the *Drexel* factors, the Global Settlement (i) *increased* recoveries to all general unsecured creditors (except for the PBGC, who expressly entered into the Global Settlement) via the PBGC Subordination and the reduction of the Allowed DIP Claims and (ii) resulted in support for the Plan from the Creditors' Committee, the ad hoc group of unsecured noteholders, and the PBGC (the Debtors' largest unsecured creditors). Given the complexity of these Chapter 11 Cases and the fact that following the Sale Transaction substantially all of the Debtors' creditors were general unsecured creditors, a settlement with and support from the Creditors' Committee, the ad hoc group of

[35] The term "Prepetition Secured Parties" means the lenders under the ABL Agreement (the "**ABL Lenders**") and JPMorgan Chase Bank, N.A., as administrative agent and collateral agent for the ABL Lenders, as defined in the *Final Order (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing Debtors to Use Cash Collateral, (III) Granting Liens and Superpriority Claims, (IV) Granting Adequate Protection to Prepetition Secured Parties, and (V) Modifying Automatic Stay* [Docket No. 526].

unsecured noteholders, and the PBGC were critical to the Debtors' ability to move forward with the Plan.

114. Notwithstanding the U.S. Trustee's Objection to limit the scope of the Global Settlement (as discussed in more detail, below), the Debtors submit that the Global Settlement is in the best interest of the Debtors and their estates, is an integral part of the distribution scheme provided in the Plan, and should be approved. Courts in this jurisdiction have approved chapter 11 plans incorporating global settlements reached among certain creditors as binding on all creditors. *See, e.g.*, *In re US Fidelis, Inc.*, 481 B.R. 503, 524-525 (Bankr. E.D. Mo. 2012) ("The Global Settlement Agreement is approved and upon the occurrence of the Effective Date terms of the Global Settlement Agreement shall be binding upon the parties in accordance with the terms thereof"); *see also See In re Peabody Energy Corp.*, No. 16-42529 (Bankr. E.D. Mo. Mar. 17, 2017) [Docket No. 2763] (confirming plan incorporating terms of global settlement).

B. The Releases.

115. In accordance with sections 1123(b)(3)(A) and 1123(b)(6) of the Bankruptcy Code, Section 10 of the Plan provides for (i) releases of all Claims and Causes of Action held by the Debtors, the Estates, and the Wind-Down Estates (the "**Debtor Releases**") against the Debtors, the Creditors' Committee, the Unsecured Notes Indenture Trustee, and such Entities' respective Related Parties[36] (collectively, the "**Released Parties**"),[37] (ii) releases of

[36] "Related Parties" means with respect to any Exculpated Party or Released Party: (a) such Entities' predecessors, successors and assigns, subsidiaries, Affiliates, managed accounts or funds, (b) all of their respective current and former officers, directors, principals, stockholders (and any fund managers, fiduciaries or other agents of stockholders with any involvement with the Debtors), members, partners, employees, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, management companies, fund advisors and other professionals, solely to the extent such persons and entities acted on the behalf of the Released Parties or Exculpated Parties in connection with the matters as to which exculpation or releases are provided in the Plan, and (c) such persons' respective heirs, executors, estates, servants and nominees. *See* Plan, 1.96.

[37] "Released Parties" means, collectively: (a) the Debtors, (b) the Creditors' Committee and each of its members in their capacity as such, (c) the Unsecured Notes Indenture Trustee, and (d) with respect to each of the foregoing entities in clauses (a) through (c), such Entities' respective Related Parties. *See* Plan, 1.97

Claims held by certain consenting holders of Claims and Interests (such holders, the "**Releasing Parties**," and such releases, the "**Third-Party Releases**" and, together with the Debtor Releases, the "**Releases**") against the Released Parties. *See* Plan, §§ 10.5, 10.6.

116. As discussed further below, the Releases are integral components of the Plan, are limited in scope, are appropriate and necessary under the circumstances, consistent with the Bankruptcy Code, and comply with applicable law. Accordingly, the Releases should be approved.

a. The Debtor Releases Are Appropriate and Should be Approved.

117. Section 10.5(a) of the Plan contains the Debtor Releases, which are the release of certain claims or Causes of Action of the Debtors and the Estates against the Released Parties in exchange for good and valuable consideration and valuable compromises made by the Released Parties. Such consideration includes, without limitation, the service of the Released Parties before and during the Chapter 11 Cases to facilitate the Sale Transaction, the Global Settlement, and the liquidation of each of the Debtors' estates. The Debtor Releases do not release any Claims or Causes of Action arising from willful misconduct, gross negligence, or intentional fraud as determined by a Final Order.

118. Claims held by a debtor against third parties are property of the estate and may be released in exchange for settlement. *See In re PWS Holding Corp.*, 228 F.3d 224, 242 (3d Cir. 2000); *In re Johns-Manville (Manville I)*, 837 F.2d 89, 91-92 (2d Cir. 1988); *see also* 11 U.S.C. § 541(a)(1). The Bankruptcy Code allows a plan to provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. § 1123(b)(3)(A).

119. When analyzing the Debtor Releases as a settlement contained in the Plan under the *Drexel* factors, it is clear that, given the value maximization and benefits provided by

the consensual Plan and Global Settlement, the Plan is in the best interest of each estate and should be approved. In addition, the Creditors' Committee supports the Debtor Releases, and no party in interest has asserted otherwise.

120. The Debtor Releases are also appropriate and in the best interests each of the Debtors' estates because the Debtors are not aware of the existence of any claims or causes of action of material value by the Debtors that are being released. As a preliminary consideration, the Debtors' Estates retained very limited causes of action. Most of the Debtors' causes of actions were sold to the Purchaser as part of the Sale Transaction[38] or were otherwise released by the Debtors pursuant to the Sale Order, at the request of the Creditors' Committee.[39] *See* Sale Order, ¶ 37(n). The Debtors do not believe there is value to be realized from what minimal causes of action the Debtors may have retained.

121. Further, the Plan provides for meaningful payments to holders of Claims in the Classes affected by the Debtor Releases. Moreover, and importantly (i) all Classes comprised of General Unsecured Claims have voted to accept the Plan and (ii) no party has objected to the Debtor Releases.

122. In addition, the Debtors note that courts in this district routinely authorize the inclusion of releases by debtors of a kind similar to the Debtor Releases in the Plan. *See, e.g.*, *In re Payless Holdings, LLC*, No. 19-40883-659 (Bankr. E.D. Mo. Oct. 23, 2019) [Docket No. 1701]; *In re Armstrong Energy, Inc.*, No. 17-47541-659 (Bankr. E.D. Mo. Feb. 2, 2018) [Docket No. 527]; *In re Payless Holdings, LLC*, No. 17-42267-659 (Bankr. E.D. Mo. July 26, 2017)

[38] *See* Stalking Horse Agreement § 1.1, § 2.1.

[39] "Upon the consummation of the Sale Transaction, all causes of action under chapter 5 of the Bankruptcy Code and any similar or related state laws are hereby waived, released, relinquished, settled and discharged, unconditionally . . . solely to the extent such causes of action . . . are Acquired Assets under the Stalking Horse Agreement." Sale Order, ¶ 37(n).

[Docket No. 1676]; *In re Abengoa Bioenergy US Holding, LLC*, No. 16-41161 (Bankr. E.D. Mo. June 8, 2017) [Docket No. 1443]; *In re Peabody Energy Corp.*, No. 16-42529 (Bankr. E.D. Mo. Mar. 17, 2017) [Docket No. 2763]; *In re Arch Coal, Inc.*, No. 16-40120 (Bankr. E.D. Mo. Sept. 13, 2016) [Docket No. 1334]; *In re Patriot Coal Corp.*, No. 12-51502 (Bankr. E.D. Mo. Dec. 18, 2013) [Docket No. 5169]; *In re U.S. Fidelis, Inc.*, No. 10-41902 (Bankr. E.D. Mo. Aug. 28, 2012) [Docket No. 1184]. Accordingly, the Debtor Releases are fair, equitable, in the best interest of each of the estates, justified under applicable Eighth Circuit law, and should be approved.

b. The Third-Party Releases are Appropriate and Should be Approved.

123. In accordance with section 1123(b)(6) of the Bankruptcy Code and consistent with Eighth Circuit case law, Section 10.6 of the Plan provides for certain releases, on a consensual basis only, by the Releasing Parties of claims they may hold against the Released Parties. The Releasing Parties include (a) the Creditors' Committee and each of its members in their capacity as such; (b) all holders of Claims who are entitled to vote on the Plan and who vote to accept the plan; (c) all holders of Claims who (i) are entitled to vote on the Plan and abstain from voting on the Plan or (ii) vote to reject the Plan and, in either case, do not elect to exercise their right, as provided in the Ballot, to opt out of granting the releases set forth in Section 10.6 of the Plan; (d) all holders of Claims who are deemed to accept or reject the Plan, are provided with a notice of non-voting status providing them with the right to opt out of the releases contained in 10.6 of the Plan, and do not elect to exercise such right; and (e) the predecessors, successors, assigns, subsidiaries, affiliates, managed accounts, or funds of any Persons or Entities in (a) through (d). The Third-Party Releases are exceedingly limited in scope, and only release the Debtors, the Creditors' Committee, the Unsecured Notes Indenture Trustee, and those parties' Related Parties.

124. As discussed below, the Debtors submit that the Third-Party Releases satisfy the standard for approval of consensual third-party releases and, accordingly, should be approved. The U.S. Trustee's and SEC's objections to the Third Party Releases are also addressed below.

III. EXCULPATION PROVISIONS ARE APPROPRIATE AND SHOULD BE APPROVED.

125. In accordance with section 1123(b)(6) of the Bankruptcy Code, Section 10.7 of the Plan (the "**Exculpation Provision**") provides an exculpation of the Debtors, the Creditors' Committee, and certain other related parties (the "**Exculpated Parties**"). *See* Plan, § 10.7. Specifically, the Exculpated Parties are exculpated for any act or omission in connection with or arising out of any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for any Claim in connection with, or arising out of, the administration of the Chapter 11 Cases, the postpetition marketing and sale process, the postpetition purchase or sale, or rescission of the postpetition purchase or sale of any security or asset of the Debtors; the negotiation and pursuit of the Disclosure Statement, the Plan, or the solicitation of votes for, or confirmation of, the Plan; the funding or consummation of the Plan; the occurrence of the Effective Date; the DIP Loan Documents; the administration of the Plan or the property to be distributed under the Plan; or the transactions in furtherance of any of the foregoing; except for fraud, gross negligence, or willful misconduct, as determined by a Final Order. *See* Plan ¶ 10.7.

126. The Exculpation Provision is consistent with established practice in this jurisdiction and others and should be approved. Courts in the Eighth Circuit and elsewhere generally evaluate the appropriateness of exculpation provisions based upon a number of factors, including the extent to which the exculpation is appropriately tailored, whether the exculpation provision was necessary and integral to the proposed plan, whether any parties have objected to

the provision, and whether protection from liability was necessary for plan negotiations. *See, e.g.*, *In re U.S. Fidelis, Inc.*, 481 B.R. at 525-26 (approving exculpation provisions as "an integral part of the Plan and as fair, equitable, reasonable and in the best interests of the Debtor, the Estate and the holders of Claims"); *In re Trans World Airlines*, 185 B.R. at 321-22 (considering, among other things, "balance of the likelihood of success of the underlying claims or potential claims," the "fact that the Plan is the product of extensive arms-length negotiations among the Debtor and its creditor constituencies," and the "absence of objections thereto" in approving exculpation provision); *In re WorldCom, Inc.*, 2003 WL 23861928, at *28 (Bankr. S.D.N.Y. 2003) (approving exculpation provision and stating that "inclusion of the Exculpation Provision . . . in the Plan [was] vital to the successful negotiations of the terms of the Plan in that without such provisions, the [parties] would have been less likely to negotiate the terms of the settlements and the Plan").

127. The Exculpation Provision is necessary to protect parties that have made substantial contributions to the Debtors' progress in these Chapter 11 Cases from collateral attacks related to good faith acts or omissions taken in connection with the Debtors' Sale Transaction and liquidation. The Exculpation Provision is limited to the Debtors, the Creditors' Committee and each of its members in their capacity as such, and each of the Related Parties of the foregoing, but only to the extent such parties are acting on behalf of the Exculpated Parties for matters to which the Exculpated Parties are entitled to Exculpation. The Exculpation Provision is exceedingly appropriate when considering that it only applies only to parties that owe fiduciary duties in these Chapter 11 Cases; the Debtors owe a fiduciary duty to the Estate and the Creditors' Committee owes a fiduciary duty to all unsecured creditors. Further, the scope of the Exculpation Provision is narrowly tailored to cover only actions taken in connection with the Chapter 11 Cases and will not affect any liability that arises from fraud, gross negligence, or willful misconduct, as

determined by Final Order.[40] Courts in this and other districts have approved similar exculpation provisions in chapter 11 plans of similarly-situated debtors.

128. Accordingly, the Exculpation provided to the Exculpated Parties is appropriate and should be approved.

IV. THE OBJECTIONS TO THE PLAN SHOULD BE OVERRULED.

129. As set forth above, notwithstanding the overwhelming support for the Plan by actual parties with a financial interest in the outcome of these Chapter 11 Cases, certain parties filed Objections to the Plan. All filed Objections, including those not expressly addressed herein, are addressed in the Objection Response Chart. As noted, no creditors or equity holders are objecting to the Plan. The only remaining objections are by government agencies. For the reasons stated herein and in the Objection Response Chart, all Objections that have not been resolved or withdrawn should be overruled, and the Plan confirmed.

A. The U.S. Trustee's and the SEC's Objections to the Third-Party Releases Should be Overruled.

130. Although no actual creditors object to the Third-Party Releases,[41] two government agencies, the SEC[42] and the U.S. Trustee,[43] filed objections to the Third-Party

[40] *See* Plan, § 10.7 (Exculpation Provision); *see also* Plan, § 1.52 ("Exculpated Parties" means collectively: (a) the Debtors, (b) the Creditors' Committee and each of its members in their capacity as such, and (c) with respect to each of the foregoing Persons or Entities in clauses (a) through (b), all of their Related Parties who acted on their behalf in connection with the matters as to which exculpation is provided herein.).

[41] In their objections, further discussed in the Objection Summary Chart, A.B., Aavid, and UFPT (the "**Objecting Administrative Claimants**") have requested confirmation that the Third-Party Releases do not apply to their administrative claims. These parties opted out of the Third-Party Releases in connection with their general unsecured claims. The Objecting Administrative Claimants have not objected to the approval of the Third-Party Releases on the whole and the Debtors have resolved these Objections through language added to the Confirmation Order stating the Objecting Administrative Claimants are deemed to have (a) received an Opt-Out Election Form and (b) timely returned the Opt-Out Election Form and elected not to grant the Third-Party Releases.

[42] *Objection of the Securities and Exchange Commission to Confirmation of Debtors' Amended Joint Chapter 11 Plan* [Docket No. 1401] (the "**SEC Objection**").

[43] *United States Trustee's Objection to Amended Joint Chapter 11 Plan of Reorganization of Briggs & Stratton Corporation and Its Affiliated Debtors* [Docket No. 1405] (the "**U.S. Trustee Objection**").

Releases. The SEC and the U.S. Trustee both object to the Third-Party Releases with respect to the holders in the Deemed Rejecting Classes (with the SEC focused on holders of Interests in Class 7(a)), arguing that the releases should be considered non-consensual as to these parties even if they were provided the opportunity to opt out and failed to do so. The U.S. Trustee makes the same argument with respect to holders of General Unsecured Claims that are entitled to vote on the Plan but either abstain from voting or vote to reject the Plan and fail to opt out of the Third-Party Releases.

1. Applicable Law Supports The Third-Party Releases

131. Courts have the authority to approve releases such as the Third-Party Releases in connection with confirming the plan. *See In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 936 (Bankr. W.D. Mo. 1994) (holding that "the Court has the authority to issue a permanent injunction or third-party release."). Courts in this district routinely exercise that authority and confirm plans containing consensual third-party releases similar in structure and scope to the Third-Party Releases at hand. *See, e.g., In re Foresight Energy LP*, No. 20-41308-659 (Bankr. E.D. Mo. June 24, 2020) [Docket No. 593] (confirming a plan where the releasing parties included creditors that (i) voted to accept; (ii) were entitled to vote and voted to reject or abstained from voting and did not opt out; and (iii) were in classes deemed to accept); *In re Payless Holdings LLC II*¸ No. 19-40883-659 (Bankr. E.D. Mo. Oct. 23, 2019) [Docket No. 1701] (confirming a plan where the releasing parties included creditors that (i) voted to accept; (ii) were entitled to vote and voted to reject or abstained from voting and did not opt out; (iii) who were not entitled to vote and did not opt out); *In re Armstrong Energy, Inc.*, No. 17-47541-659 (Bankr. E.D. Mo. Feb. 2, 2018) [Docket No. 527] (confirming plan where releasing parties included all holders of claims and interests unless they expressly objected); *In re Payless Holdings LLC I,* No. 17-42267-659 (Bankr. E.D. Mo. July 26, 2017) [Docket No. 1676] (confirming a plan where the

releasing parties included creditors that (i) voted to accept; (ii) were entitled to vote and voted to reject or abstained from voting and did not opt out; (iii) were not entitled to vote and did not opt out); *In re Arch Coal, Inc.*, No. 16-40120-705 (Bankr. E.D. Mo. Sept. 15, 2016) [Docket No. 1334] (confirming plan where releasing parties included (i) holders of claims in classes who deemed to have accepted or rejected the plan and did not opt out of the releases and (ii) holders of claims who voted to accept or reject the plan and did not opt out of the releases).

132. Here, the Releasing Parties have all consented to the Third-Party Releases in accordance with the applicable standards. Notably, the Releasing Parties here either (i) voted to accept the Plan; (ii) abstained from voting on the Plan or voted to reject the Plan, but in either case have been afforded the opportunity to opt out of the Third-Party Releases and did not opt out of granting the Third-Party Releases; (iii) are unimpaired by the Plan and therefore presumed to accept the Plan, have been afforded the opportunity to opt out of the Third-Party Releases, and did not opt out; or (iv) are holders of impaired non-voting claims and therefore deemed to reject the Plan, have been afforded the opportunity to opt out of the Third-Party Releases, and did not opt out. *See* Plan, § 10.6 (defining "Releasing Parties"). The U.S. Trustee is objecting to the Third-Party Releases in the second and fourth category, and the SEC is objecting to the Third-Party Releases in the fourth category. No one is objecting to the first and third category of Third-Party Releases.

133. First, with respect to the holders of Claims entitled to vote that voted to accept the Plan, these creditors indicated their express consent to the Third-Party Releases by voting to accept the Plan. *See Coram Healthcare Corp.*, 315 B.R. 321, 336 (Bankr. D. Del. 2004) (finding that voting in favor of a plan of reorganization that provides for a third-party release indicates consent to the release, even without an explicit election opting to accept the third-party

release provision); *In re Exide Techs.*, 303 B.R. 48, 74 (Bankr. D. Del. 2003) (same); *see also In re Foresight Energy LP*, No. 20-41308-659 (Bankr. E.D. Mo. June 24, 2020) [Docket No. 593] (confirming plan and approving third-party releases where releasing creditors were impaired and voted to accept the plan); *In re Payless Holdings LLC II*¸ No. 19-40883-659 (Bankr. E.D. Mo. Oct. 23, 2019) [Docket No. 1701] (same); *In re Payless Holdings LLC I*, No. 17-42267-659 (Bankr. E.D. Mo. July 26, 2017) [Docket No. 1676] (same); *In re Armstrong Energy, Inc.*, No. 17-47541-659 (Bankr. E.D. Mo. Dec. 18, 2017) [Docket No. 527] (same); *In re Peabody Energy Corp.*, No. 16-42529-399 (Bankr. E.D. Mo. Mar. 17, 2017) [Docket No. 2763] (same); *In re Arch Coal, Inc.*, No. 16-40120-705 (Bankr. E.D. Mo. Sept. 15, 2016) [Docket No. 1334] (same).[44]

134. Second, with respect to those holders in the voting classes that abstained from voting on the Plan or voted to reject the Plan and did not opt out of the Third-Party Releases, the Third-Party Releases are nonetheless consensual because such parties had an opportunity to affirmatively opt out of the Third-Party Releases, had adequate notice the procedure to opt out and the effect of not opting out, and did not do so. *See In re Indianapolis Downs, LLC*, 486 B.R. 286, 306 (Bankr. D. Del. 2013) (finding that third-party releases were consensual and binding on creditors who abstained from voting on the plan or who voted to reject the plan and did not opt out of releases, where such creditors were provided detailed instructions on how to opt out and had

[44] Case law in other jurisdictions is consistent with this district. *See In re Modell's Sporting Goods, Inc.*, No. 20-14179 (Bankr. D.N.J. Nov. 13, 2020) [Docket No. 827] (confirming plan and approving third-party releases where releasing creditors voted to accept the plan); *In re SLT Holdco, Inc*, No. 20-18368 (Bankr. D.N.J. Oct. 19, 2020) [Docket No. 540] (same); *In re Exide Holdings, Inc.*, No. 20-11157 (Bnkr. D. Del. Oct. 16, 2020) [Docket No. 998] (same); *In re GNC Holdings*, No. 20-11662 (Bankr. D. Del. Oct. 14, 2020) [Docket No. 1415] (same); *In re Old Mkt. Grp. Holdings Corp.*, No. 20-10161 (Bankr. S.D.N.Y. Oct. 5, 2020) [Docket No. 806] (same); *In re Stage Stores, Inc.* No. 20-32564 (Bankr. S.D. Tex. Aug. 14, 2020) [Docket No. 705] (same); *In re RentPath Holdings, Inc.*, No. 20-10312 (Bankr. D. Del. June 10, 2020) [Docket No. 416] (same); *In re Insys Therapeutics, Inc.*, No. 19-11292 (Bankr. D. Del. Jan. 16, 2020) [Docket No. 1115] (same); *In re Castex Energy Partners, L.P.*, No. 17-35835 (Bankr. S.D. Tex. Feb. 27, 2018) [Docket No. 448] (same); *In re The Gymboree Corp.*, No. 17-32986 (Bankr. E.D. Va. Sept. 7, 2017) [Docket No. 646] (same); *In re Goodman Networks, Inc.* No. 17-31575 (Bankr. S.D. Tex. May 5, 2017) [Docket No. 236] (same); *In re Penn Virginia Corp.*, No. 16-32395 (Bankr. E.D. Va. Aug. 11, 2016) [Docket No. 581] (same).

the opportunity to do so by marking their ballots). Courts in this district and others have approved third-party releases as consensual where holders of claims or interests failed to opt out of the releases when such creditors were provided detailed instructions on how to opt out. *See, e.g.*, *In re Foresight Energy LP*, No. 20-41308-659 (Bankr. E.D. Mo. June 24, 2020) [Docket No. 593] (confirming plan and approving third-party releases by creditors that had consented by not opting out of the release, either by abstaining from voting or by voting against the plan without affirmatively electing to opt out); *In re Payless Holdings LLC II*¸ No. 19-40883-659 (Bankr. E.D. Mo. Oct. 23, 2019) [Docket No. 1701] (same); *In re Armstrong Energy, Inc.*, No. 17-47541-659 (Bankr. E.D. Mo. Feb. 2, 2018) [Docket No. 527] (same); *In re Payless Holdings LLC I*, No. 17-42267-659 (Bankr. E.D. Mo. July 26, 2017) [Docket No. 1676] (same); *In re Arch Coal, Inc.*, No. 16-40120-705 (Bankr. E.D. Mo. Sept. 15, 2016) [Docket No. 1334] (same).[45]

135. Here, the Debtors provided clear notice of the release, exculpation, and injunction provisions of the Plan and clearly and conspicuously indicated in the Ballots[46] that the

[45] *See also In re Modell's Sporting Goods, Inc.*, No. 20-14179 (Bankr. D.N.J. Nov. 13, 2020) [Docket No. 827] (confirming plan and approving third-party releases where releasing creditors were entitled to vote and declined to opt out of the releases); *In re SLT Holdco, Inc,* No. 20-18368 (Bankr. D.N.J. Oct. 19, 2020) [Docket No. 540] (same); *In re Exide Holdings, Inc.*, No. 20-11157 (Bankr. D. Del. Oct. 16, 2020) [Docket No. 998] (same); *In re GNC Holdings*, No. 20-11662 (Bankr. D. Del. Oct. 14, 2020) [Docket No. 1415] (same); *In re Stage Stores, Inc.* No. 20-32564 (Bankr. S.D. Tex. Aug. 14, 2020) [Docket No. 705] (same); *In re RentPath Holdings, Inc.*, No. 20-10312 (Bankr. D. Del. June 10, 2020) [Docket No. 416] (same); *In re Insys Therapeutics, Inc.*, No. 19-11292 (Bankr. D. Del. Jan. 16, 2020) [Docket No. 1115] (same); *In re Castex Energy Partners, L.P.*, No. 17-35835 (Bankr. S.D. Tex. Feb. 27, 2018) [Docket No. 448] (same); *In re Gen. Wireless Ops. Inc. dba Radioshack*, No. 17-10506 (BLS) (Bankr. D. Del. Oct. 26, 2017) [Docket No. 1117] (same); *In re New Gulf Res., LLC*, No. 15-12566 (BLS) (Bankr. D. Del. Apr. 20, 2016) [Docket No. 514] (same); *In re Am. Apparel, Inc.*, No. 15-12055 (BLS) (Bankr. D. Del. Jan. 27, 2016) [Docket No. 687] (same); *see also In re GenOn Energy, Inc.*, No. 17-33695 (Bankr. S.D. Tex. Dec. 12, 2017) [Docket No. 1250] (confirming plan and approving third-party releases where the releasing parties included all holders of claims and interests who did no opt out of or object to the releases); *In re Goodman Networks, Inc.* No. 17-31575 (Bankr. S.D. Tex. May 5, 2017) [Docket No. 236] (confirming plan and approving third-party releases where the releasing parties included creditors who (i) abstained from voting or voted to reject the plan and (ii) did not opt out of the releases in the plan); *In re Penn Virginia Corp.*, No. 16-32395 (Bankr. E.D. Va. Aug. 11, 2016) [Docket No. 581] (confirming plan and approving third-party releases where releasing creditors were entitled to vote, abstained from voting, and did not opt out of the releases).

[46] For a general form version of a Ballot, see *Order (I) Approving Disclosure Statement; (II) Establishing Notice and Objection Procedures for Confirmation of Plan; (III) Approving Solicitation Packages and Procedures for*

solicited holders would be deemed to have consented to the releases set forth in section 10.6 of the Plan if they voted to reject the Plan or abstained from voting on the Plan and did not opt out of granting the Third-Party Releases. Specifically, the Debtors' ballots, exhibits C-1 to C-3 (the "**Ballots**")[47] included in Item 2, directly above the boxes that a creditor voting on the Plan would check to vote to accept or reject the Plan, the following statement in a textbox in bold:

> **Prior to voting on the Plan, please note the following:**
>
> **If you vote to accept the Plan, you shall be deemed to have consented to the release, injunction, and exculpation provisions set forth in Sections 10.4, 10.5, 10.6, 10.7, 10.10, and 10.11 of the Plan.**
>
> **If you (i) do not vote either to accept or reject the Plan or (ii) vote to reject the Plan and, in each case, do not check the box in Item 3 below, you shall be deemed to have consented to the release provisions set forth in Section 10.6 of the Plan.**
>
> **The Disclosure Statement and the Plan must be referenced for a complete description of the release, injunction, and exculpation.**

136. In Item 3 of the Ballots, creditors voting on the Plan were given the option to opt out of the releases in Section 10.6 of the Plan and were given clear instructions to check the box if the creditors wanted to opt out of the Third-Party Releases. Item 3 provided:

> **Item 3. Optional Opt Out Release Election.** Check the box below if you elect not to grant the releases contained in Section 10.6 of the Plan. If you voted to accept the Plan in Item 2 above, you may not complete this Item 3, and if you complete this Item 3, your "opt out" election will be ineffective. If you voted to reject the Plan in Item 2 above, or if you are abstaining from voting to accept or reject the Plan, check this box if you elect not to grant the releases contained in Section 10.6 of the Plan. Election to withhold consent is at your option. If you submit a rejecting Ballot, or if you abstain from submitting a Ballot, and in each case, you do not check the box below, you will be deemed to consent to the releases contained in Section 10.6 of the Plan to the fullest extent permitted by applicable law. The Holder of the Class 4 General Unsecured Claim set forth in Item 1 elects to:
>
> ☐ **OPT OUT** of the releases contained in Section 10.6 of the Plan.

Distribution Thereof; (IV) Approving the Form of Ballots and Establishing Procedures for Voting on the Plan; and (V) Granting Related Relief (the "**Solicitation Procedures Order**"), Exhibits C-1, C-2, and C-3.

[47] *See* Exhibits C-1 to C-3 of the Solicitation Procedures Order.

137. The Ballots also provided, in bold, a notice regarding the release, exculpation, and injunction provisions in the Plan. The notice states:

> **If you (i) vote to accept the Plan or (ii) do not opt out of granting the releases set forth in the Plan, you shall be deemed to have consented to the releases contained in Section 10 of the Plan.**

The Ballot then listed Sections 10.4, 10.5, 10.6, 10.7, 10.8, 10.9, 10.10, and 10.11, providing for releases, exculpation, and injunction, in their entirety, in bold. At the end of the notice, the Ballot stated, in bold and all caps:

> **YOU ARE ADVISED AND ENCOURAGED TO CAREFULLY REVIEW AND CONSIDER THE PLAN, INCLUDING THE RELEASE, EXCULPATION AND INJUNCTION PROVISIONS, AS YOUR RIGHTS MIGHT BE AFFECTED.**

138. Additionally, the cover page of the Ballot listed contact information for KCC, in case creditors had "any questions on how to properly complete [the] Ballot[.]"

139. The Ballots made clear that the Plan includes the Third-Party Releases and that the creditors will be subject to the Third-Party Releases unless they check the box clearly labeled "Opt Out." The detailed disclosures and instructions provided on how to opt out are consistent with the precedent cases in which the releasing parties included impaired parties that declined to opt out of the plan. *See Indianapolis Downs*, 486 B.R. at 306 ("As for those impaired creditors who abstained from voting on the Plan, or who voted to reject the Plan and did not otherwise opt out of the releases, the record reflects these parties were provided detailed instructions on how to opt out, and had the opportunity to do so by marking their ballots. Under these circumstances, the Third-Party Releases may be properly characterized as consensual and will be approved.").

140. Third, with respect to non-voting holders of Claims that are unimpaired under the Plan (the "**Presumed Accepting Classes**"), they have been afforded the opportunity to

opt out of the Third-Party Releases, and, if they did not opt out, they are deemed to consent to the Third-Party Releases. Courts in this district and others have found releases to be consensual where creditors are unimpaired and deemed to accept a plan without their affirmative consent where, as is the case here, such deemed accepting creditors are receiving adequate consideration for their release by being paid in full pursuant to the plan. *See In re Foresight Energy LP*, No. 20-41308-659 (Bankr. E.D. Mo. June 24, 2020) [Docket No. 593] (confirming plan and approving third-party releases where releasing creditor was unimpaired and presumed to accept); *In re Payless Holdings LLC II*¸ No. 19-40883-659 (Bankr. E.D. Mo. Oct. 23, 2019) [Docket No. 1701] (same); *In re Payless Holdings LLC I,* No. 17-42267-659 (Bankr. E.D. Mo. July 26, 2017) [Docket No. 1676] (same); *In re Armstrong*, No. 17-47541-659 (Bankr. E.D. Mo. Dec. 18, 2017) [Docket No. 527] (same); *In re Peabody Energy Corp.*, No. 16-42529-399 (Bankr. E.D. Mo. Mar. 17, 2017) [Docket No. 2763] (same); *In re Arch Coal, Inc.*, No. 16-40120-705 (Bankr. E.D. Mo. Sept. 15, 2016) [Docket No. 1334] (same).[48] As discussed below, the Presumed Accepting Classes received

[48] *See also, e.g.*, *In re Lucky Brand Dungarees, LLC*, No. 20-11768 (Bankr. D. Del. Nov. 17, 2020) [Docket No. 572] (confirming plan and approving third-party releases where releasing parties included creditors who were unimpaired and presumed to accept and did not opt out of the releases in the plan); *In re SLT Holdco, Inc,* No. 20-18368 (Bankr. D.N.J. Oct. 19, 2020) [Docket No. 540] (confirming plan and approving third-party releases where releasing parties included creditors who were unimpaired and presumed to accept); *In re Exide Holdings, Inc.*, No. 20-11157 (Bnkr. D. Del. Oct. 16, 2020) [Docket No. 998] (same); *In re RentPath Holdings, Inc.*, No. 20-10312 (Bankr. D. Del. June 10, 2020) [Docket No. 416] (same); *In re Stage Stores, Inc.* No. 20-32564 (Bankr. S.D. Tex. Aug. 14, 2020) [Docket No. 705] (same); *In re Insys Therapeutics, Inc.*, No. 19-11292 (Bankr. D. Del. Jan. 16, 2020) [Docket No. 1115] (same); *In re Castex Energy Partners, L.P.*, No. 17-35835 (Bankr. S.D. Tex. Feb. 27, 2018) [Docket No. 448] (same); *In re GenOn Energy, Inc.*, No. 17-33695 (Bankr. S.D. Tex. Dec. 12, 2017) [Docket No. 1250] (confirming plan and approving third-party releases where the releasing parties included all holders of claims and interests who did no opt out of or object to the releases); *In re The Gymboree Corp.*, No. 17-32986 (Bankr. E.D. Va. Sept. 7, 2017) [Docket No. 646] (confirming plan and approving third-party release where releasing parties included parties presumed to accept the plan); *In re Offshore Grp. Inv. Ltd*, No. 15-12422 (BLS) (Bankr. D. Del. Jan. 15, 2016) [Docket No. 188] (same); *In re Penn Virginia Corp.*, No. 16-32395 (Bankr. E.D. Va. Aug. 11, 2016) [Docket No. 581] (same); *In re Optim Energy, LLC*, No. 14-10262 (BLS) (Bankr. D. Del. Oct. 14, 2015) [Docket No. 1318] (same); *see also U.S. Bank Nat'l Assoc. v. Wilmington Tr. Co. (In re Spansion, Inc.)*, 426 B.R. 114, 144 (Bankr. D. Del. 2010) (finding that a release was not overreaching to the extent it bound unimpaired classes deemed to have accepted the plan as those creditors had not objected to the release, were being paid in full, and had received adequate consideration for the release); *see also Indianapolis Downs*, 486 B.R. at 306 ("In this case, the third-party releases in question bind certain unimpaired creditors who are deemed to accept the Plan: these creditors are being paid in full and have therefore received consideration for the releases.").

sufficient notice of the Third-Party Releases and instructions on how to opt out of The Third-Party Releases.

141. Fourth, holders of Claims in Classes 5, 6, and 7 are deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code ("**Deemed Rejecting Classes**"). Accordingly, such holders were not entitled to vote to accept or reject the Plan. Courts in this district and others have found that non-debtor releases may appropriately be deemed consensual even where affected claimants or interest holders are impaired and/or in classes deemed to reject the plan where they are given an opportunity to opt out of such releases. *See, e.g., In re Payless Holdings LLC II*¸ No. 19-40883-659 (Bankr. E.D. Mo. Oct. 23, 2019) [Docket No. 1701] (approving a plan with third-party releases that included as releasing parties all holders deemed to reject that did not opt out of the releases); *In re Armstrong Energy, Inc.*, No. 17-47541-659 (Bankr. E.D. Mo. Feb. 2, 2018) [Docket No. 527] (same); *In re Payless Holdings LLC I*, No. 17-42267-659 (Bankr. E.D. Mo. July 26, 2017) [Docket No. 1676] (same); *In re Arch Coal, Inc.*, No. 16-40120-705 (Bankr. E.D. Mo. Sept. 15, 2016) [Docket No. 1334] (same).[49]

[49] *See also In re SLT Holdco, Inc.*, No. 20-18368 (Bankr. D.N.J. Oct. 19, 2020) [Docket No. 540] (confirming plan and approving releases where holders in classes deemed to reject were included as releasing parties); *In re Stage Stores, Inc.* No. 20-32564 (Bankr. S.D. Tex. Aug. 14, 2020) [Docket No. 705] (confirming plan in which holders of claims and interests in classes deemed to reject who did not opt out of the releases were included as releasing parties); *In re RentPath Holdings, Inc.*, No. 20-10312 (Bankr. D. Del. June 10, 2020) [Docket No. 416] (confirming plan in which holders in classes deemed to reject were included as releasing parties); Hr'g Tr. at 110:5-22, *In re Insys Therapeutics, Inc.*, No. 19-11292 (KG) (Bankr. D. Del. Jan. 16, 2020) [Docket No. 1121] (approving third-party releases in which holders of claims or interests in classes deemed to reject where there was clear notice of the opt-out requirement); *In re Hexion Holdings LLC*, No. 19-10684 (KG) (Bankr. D. Del. June, 25, 2019) [Docket No. 920] (confirming a plan with third-party releases that included as releasing parties all holders in classes deemed to reject that did not file a timely objection to confirmation of the plan with respect to the releases); *In re EV Energy Partners, L.P.*, No. 18-10814 (CSS) (Bankr. D. Del. May 17, 2018) [Docket No. 238] (confirming a plan where holders in deemed rejecting classes had to affirmatively opt out of third-party releases); *In re Castex Energy Partners, L.P.*, No. 17-35835 (Bankr. S.D. Tex. Feb. 27, 2018) [Docket No. 448] (confirming plan and approving third-party releases where releasing creditors included holders of claims or equity interests in classes in presumed to reject the Plan who did not opt out of the releases); *In re GenOn Energy, Inc.*, No. 17-33695 (Bankr. S.D. Tex. Dec. 12, 2017) [Docket No. 1250] (confirming plan and approving third-party releases where the releasing parties included all holders of claims and interests, including those in classes deemed to reject, who did no opt out of or object to the releases).

142. The holders of Claims and Interests in the Presumed Accepting Classes and Deemed Rejecting Classes were given ample notice of the Third-Party Releases and detailed instructions on how to opt out of the Third-Party Releases. Pursuant to the Solicitation Procedures Order, the holders of Claims in the Presumed Accepting Classes and Deemed Rejecting Classes received a notice of non-voting status (the "**Notices of Non-Voting Status**"),[50] including a form to opt out of the Third-Party Releases (the "**Opt-Out Election Form**"). The Notices of Non-Voting Status and the Opt-Out Election Form provided holders with notice of the releases and instructions on how to opt out of the releases, and, importantly, provided due and adequate notice that they would be granting the Third-Party Releases by failing to complete and return their Opt-Out Election Form. The Notices of Non-Voting Status stated in a box at the top of the notices:

> **IF YOU DO NOT OPT OUT OF GRANTING THE RELEASES SET FORTH IN THE PLAN USING THE "OPT-OUT FORM" ANNEXED HERETO, YOU SHALL BE DEEMED TO HAVE CONSENTED TO THE RELEASES CONTAINED IN SECTION 10.6 OF THE PLAN. IN ORDER TO OPT OUT OF THE RELEASES, THE OPT-OUT FORM MUST BE COMPLETED, EXECUTED, AND RETURNED SO THAT IT IS ACTUALLY RECEIVED BY THE VOTING AGENT ON OR BEFORE DECEMBER 11, 2020 AT 5:00 P.M. (PREVAILING CENTRAL TIME) (THE "OPT-OUT DEADLINE"), UNLESS EXTENDED BY THE DEBTORS.**

143. The Notices of Non-Voting Status also included the following instructions on how to opt out of releases:

> If the Debtors have identified you as a Holder of Priority Tax Claims, Priority Non-Tax Claims, or Other Secured Claims, you will receive an election form attached hereto as **Schedule A** (the "**Opt-Out Election Form**"). In accordance with the Plan, Holders of Priority Tax Claims, Priority Non-Tax Claims, and Other Secured Claims may elect to opt out of the releases contained in Section 10.6 of the Plan by making such election on the Opt-Out Election Form and returning the Opt-Out Election Form by no later than **December 11, 2020 at 5:00 p.m. (prevailing Central Time)** to Briggs Ballot Processing Center, c/o KCC LLC, 222 N. Pacific Coast Highway, Suite 300, El Segundo, CA 90245.

[50] For a general form of the Notice of Non-Voting Status, see the Solicitation Procedures Order, Exhibits D and E.

Immediately after that information, the Notice of Non-Voting Status listed, in bold, the parties that are deemed to have granted the releases under Section 10.6 of the Plan.

144. Schedule A to the Notice of Non-Voting Status stated the creditors receiving the notice may find a description of their rights in the Disclosure Statement and provided contact information for KCC, the Debtors' voting agent, from which creditors could obtain further information. Schedule A additionally listed, in bold, Sections 10.4, 10.5, 10.6, 10.7, 10.8, 10.9, 10.10, and 10.11, providing for releases, exculpation, and injunction, in their entirety. After the notice of releases, exculpation, and injunction, the Notices of Non-Voting Status stated:

> **YOU ARE ADVISED AND ENCOURAGED TO CAREFULLY REVIEW AND CONSIDER THE PLAN, INCLUDING THE RELEASE, EXCULPATION AND INJUNCTION PROVISIONS, AS YOUR RIGHTS MIGHT BE AFFECTED.**

145. The Opt-Out Election Form itself provided the following instructions, noting that if the creditor did not check the box, the creditor would be deemed to consent to the releases in Section 10.6:

> **Optional Opt-Out Release Election.** Check the box below if you elect not to grant the releases contained in Section 10.6 of the Plan. If you do not check the box below and return this Opt-Out Form, you will be deemed to consent to the releases contained in Section 10.6 of the Plan to the fullest extent permitted by applicable law. The undersigned holder of a Non-Voting Class elects to:
>
> ☐ **OPT OUT** of the releases contained in Section 10.6 of the Plan.

146. The Notices of Non-Voting Status instructed creditors not entitled to vote to return the Opt-Out Election Form in one of two ways: (i) to submit the Opt-Out Election Form by first class mail, overnight delivery, or personal delivery to the address provided for KCC or (ii) to submit an electronic Opt-Out Election Form on the case website maintained by KCC. The Notices of Non-Voting Status stated in bold, capital letters that the Opt-Out Election Form must be received by KCC no later than 5:00 p.m., Prevailing Central Time, on December 11, 2020.

147. The Notices of Non-Voting Status provided KCC's contact information to creditors who had questions regarding the Notice of Non-Voting Status and the Opt-Out Election Form. The Opt-Out Election Form additionally noted contact information for any creditors who needed assistance in completing and submitting their Opt-Out Election Forms.

148. The Third-Party Releases, as described above, are consensual, as the Debtors' solicitation materials, *i.e.*, the Ballots and the Opt-Out Election Form, each provide clear and conspicuous notice of the process for opting out of the Third-Party Releases. To opt out of the releases, the only thing that holders of Claims had to do was check a box and mail back the form *or* simply go onto the Voting Agent's website and check a box—a much simpler and easier mechanism than what has been approved in other cases (such as the requirement to file an objection). *See, e.g.*, *U.S. Fidelis*, 481 B.R. at 517 ("If a creditor wants to preserve his right to object to confirmation, on whatever ground, he must file an objection. If he does not file an objection, he generally cannot complain about the results of the confirmation proceeding—even if he voted to reject the plan."); *In re VER Techs. Holdco LLC*, No. 18-10834 (Bankr. D. Del. July 26, 2018) [Docket No. 647] (confirming a plan that required parties in interest to file formal objections to the plan to be excluded as releasing parties); *In re Seadrill Ltd.*, No. 17-60079 (Bankr. S.D. Tex. Apr. 17, 2018) [Docket No. 1181] (confirming a plan in which all holders of claims and interests were included as releasing parties unless such parties submitted timely objections); *In re Orchard Acquisition Co.*, No. 17-12914 (Bankr. D. Del. 2018) [Docket No. 152] (finding third-party releases were consensual where unimpaired creditors were required to file an objection to confirmation to avoid granting releases); *In re The Gymboree Corp.*, No. 17-32986 (Bankr. E.D. Va. Sept. 7, 2017) [Docket No. 646] (confirming plan and approving third-party releases in which

releasing parties included holders of claims entitled to vote who abstained from voting on the Plan and did not object to the Plan).

149. Further, all creditors received notice of the deadline to vote on the Plan and object to confirmation of the Plan. *See Certificate of Service* [Docket No. 1301]. The Debtors additionally published the notice of the objection deadline and confirmation hearing in the *New York Times, National Edition*, and the *St. Louis Post-Dispatch*. *See Certificate of Publication* [Docket No. 1302]. All creditors were on notice of the Plan, the Third-Party Releases, and the opt-out mechanism. *See* Confirmation Hr'g Tr. at 44, *In re Energy & Expl. Partners, Inc.*, No. 15-44931 (Bankr. N.D. Tex. Apr. 21, 2016) [Docket No. 730] (finding that actual notice and sufficiently specific release language satisfies a debtor's due process obligations and binds parties that do not object to the releases).

150. The overwhelming support of voting creditors for the Plan – and the important fact that no actual creditor is objecting to the Third-Party Releases – further support the Third Party Releases in the Plan. *See* Confirmation Hr'g Tr. at 50:9-11, *In re Payless Holdings LLC I*, No. 17-42267 (Bankr. E.D. Mo. July 28, 2017) [Docket No. 1690] ("The Court cannot ignore the overwhelming support of creditors for [the] plan" when considering whether to approve third-party releases as appropriate); *see also* Confirmation Hr'g Tr. at 64:2-5, *In re Foresight Energy*, No. 20-41308 (Bankr. E.D. Mo. June 24, 2020) [Docket No. 592] (finding third-party releases and related opt-out mechanism were appropriate and noting "there has been no economic party that has objected to the releases … [a]nd it appears that we would not be where we are today with the consensual plan without those releases.").

151. The Debtors worked extensively with the Creditors' Committee and other parties to provide a meaningful recovery to unsecured creditors and to ensure creditors supported

the Plan. This was no small feat, given the complex and contentious nature of these chapter 11 cases and the possibility of administrative insolvency at the outset of these chapter 11 cases. In deciding whether to confirm the Plan and approve the Third-Party Releases, courts have given more weight to the views of the creditors in overruling similar objections from government agencies. *See* Confirmation Hr'g Tr. at 50:11-23, *In re Payless Holdings LLC I*, No. 17-42267 (Bankr E.D. Mo. July 28, 2017) [Docket No. 1690] (overruling objections to third party releases where, after contentious negotiations with the creditors' committee, the debtors and the creditors' committee reached a proposed plan deal providing more funds for unsecured creditors and for third-party releases); Confirmation Hr'g Tr. at 110:5-111:3, *In re Insys Therapeutics, Inc.*, No. 19-11292 (Bankr. D. Del. Jan. 16, 2020) [Docket No. 1127] (overruling SEC and U.S. Trustee objections to third party releases where the releases were essential to the settlement and the plan).

152. The notice worked. Some creditors and equity holders have opted out of the Third-Party Releases:

- The Debtors received twenty-three (23) Opt-Out Election Forms from unimpaired creditors presumed to accept the Plan, twenty-two (22) of which opted out of the Third-Party Releases.

- The Debtors received 171 Opt-Out Election Forms from impaired parties deemed to reject the Plan, of which 134 opted out of the Third-Party Releases.[51]

- In addition, 500 beneficial accounts of holders of Equity Interests (holding 996,073 shares) opted out of the Third-Party Releases.

- Of the creditors entitled to vote and who abstained from voting or voted to reject the Plan, almost one hundred (100) creditors elected to opt out of the Third-Party Releases: ninety (90) creditors from Class 4(a) (General Unsecured Claims Against BSC), seven (7) creditors from Class 4(b)

[51] All of the 171 Opt-Out Election Forms received from holders in impaired classes were submitted by members of Class 7(a) (Equity Interests).

(General Unsecured Claims Against BGI), and one (1) creditor from Class 4(c)) (General Unsecured Claims Against ABI).[52]

Such elections demonstrate the clarity of language in the Ballots and the Notices of Non-Voting Status and the efficacy of soliciting creditors' assent or dissent to the Third-Party Releases through the same.[53]

2. The Objections Are Misplaced

153. Notwithstanding the minimal burden placed on parties to opt out of the Third-Party Releases, and the numerous cases described above where releases structured similarly to the Third-Party Releases here were approved by courts as consensual, the SEC and U.S. Trustee ask this Court to hold that the Third-Party Releases in these cases are non-consensual. These Objections should be overruled.

154. First, while there are courts that have ruled in favor of the SEC's position that releases are only consensual where creditors opt into the release, *see* SEC Objection ¶ 21, this is the minority view.[54] Indeed, no court in this district has upheld the stringent standards proposed by the SEC. Rather, courts in this district have found that "voting to accept the plan *is not required to establish . . . consent*" to third-party releases. *U.S. Fidelis*, 481 B.R. at 517 (emphasis added). Specifically, the Bankruptcy Court for the Eastern District of Missouri in *U.S. Fidelis* noted that "a vote to reject a plan is not a per se refusal to consent to a third-party release in that plan[.]" *Id.* The court noted that to preserve the right to object to confirmation, "on whatever ground, [a

[52] No creditors in the other two Voting Classes, Classes 4(d) or 4(e), elected to opt out of the Third-Party Releases.

[53] In the event any creditors were confused by the language of the Ballots or the Notices of Non-Voting Status, both provided the contact information for KCC on the first page to answer any questions on how to properly fill out the Ballot or Opt-Out Election Form.

[54] *See In re Emerge Energy Services LP*, No. 19-11563, 2019 WL 7634308, at *18 (Bankr. D. Del. Dec. 5, 2019) ("The Court understands that its position [on requiring creditors to opt in to third-party releases] is a minority amongst the judges of this District.").

creditor] must file an objection" and if the creditor does not file an objection, the creditor "generally cannot complain about the results of the confirmation proceeding—even if [the creditor] voted to reject the plan." *Id.* The SEC's attempt to distinguish this case by pointing out certain factual differences is unavailing. Factual differences exist between any two cases. What is more relevant is that the Court firmly rejected the SEC's primary principle that silence in bankruptcy cannot be deemed consent.

155. The SEC further argues that general principles of contract law determine consent in the bankruptcy context, citing decisions following the minority position in requiring creditors to opt into third-party releases. S*ee* SEC Objection ¶¶ 15-18, 20. However, in addition to being contrary to precedent in this district, the SEC and the minority view on third-party releases overlook the relevant statutory provisions enacted by Congress. Specifically, section 1141(a) of the Bankruptcy Code binds holders of claims and interests to a plan's provisions—including third-party releases—if such parties receive proper notice but fail to object to confirmation of the plan. The plan is binding regardless of whether the creditors were able to vote or voted to accept the plan pursuant to general principles of contract law. *See* 11 U.S.C. § 1141(a) (providing that a confirmed plan binds, among others, "any creditor … whether or not the claim or interest of such creditor … is impaired under the plan …or … has accepted the plan").

156. Indeed, bankruptcy courts have stated that "[r]eferences to chapter 11 plans as contracts or agreements—while useful for purposes of interpreting plans … —are only by analogy[.]" *In re Frontier Ins. Grp., Inc.*, 585 B.R. 685, 693 (Bankr. S.D.N.Y. 2018), *aff'd*, 598 B.R. 87 (S.D.N.Y. 2019) ("[T]he chapter 11 plan is . . . a 'super-contract'—not because it is signed by all of the parties with claims against the debtor and holders of interests affected by the plan who participated in the case, but because of applicable provisions of the Bankruptcy Code and

principles of res judicata."). Bankruptcy courts routinely confirm plans and bind creditors, even where creditors object to the plan. *See* Confirmation Hr'g Tr. 71:18-22, *In re Tops Holding II Corp.*, No. 18-22279 (Bankr. S.D.N.Y. Nov. 9, 2018) [Docket No. 783] ("[A]s a statutory matter . . . Congress intended Chapter 11 plans to be super contracts, that is, they are binding on the parties in the case referred to [in the releases], notwithstanding the fact that those parties did not sign the contract. They did not sign the plan."); *In re Platinum Oil Props., LLC*, 465 B.R. 621, 638 (Bankr. D.N.M. 2011) ("[C]onfirmation binds creditors and other parties in interest even if those parties have not accepted the plan . . . 'even if it had a different understanding of [the plan's terms] or did not realize their effect.'") (quoting *In re K.D. Co., Inc.*, 254 B.R. 480, 491 (B.A.P. 10th Cir. 2000)). Thus, it is commonplace in bankruptcy to put the burden on parties in interest to speak up in some way or be bound.

157. Similarly, even the United States Supreme Court has acknowledged the Bankruptcy Code's relaxed standards for consent, *i.e.* that silence can be considered consent. In *Wellness Int'l Network, Ltd. v. Sharif*, the Court recognized that implied consent by failure to act in the bankruptcy context *is* consent. 575 U.S. 665, 125 S. Ct. 1932, 1948 (2015) (adopting an "implied consent standard" for "adjudications by bankruptcy courts under § 157."). The Court there noted that such an implied consent standard, "[a]pplied in the bankruptcy context," offers "pragmatic" advantages, like "increasing judicial efficiency and checking gamesmanship." *Id.* If such an implied consent standard satisfies the strictures of Article III, a similar implied consent standard should apply to determining whether parties consent to a provision within a chapter 11 plan. *Cf. id.*

158. Under the foregoing principles, parties that were provided an opportunity to opt out but did not opt out consented to the Third-Party Releases regardless of the application of

general principles of contract law. However, even if this Court were to apply general principles of contract law, the Third-Party Releases meet the applicable contractual standards for acceptance cited by the SEC and are therefore consensual. *See U.S. Fidelis*, 481 B.R. at 517 (finding principles of contract law may be one way of establishing consent to third-party releases). Under New York law, which governs the Plan,[55] courts recognize that "[w]hen a party is under a duty to speak … then [the party's] silence may be deemed to be acquiescence." *Albrecht Chem.*, 298 N.Y. at 440 (citing *Tanenbaum Textile Co. v. Schlanger*, 287 N.Y. 400, 404 (1942)); *see also Friedman v. Schwartz*, No. CV 08-2801 (WDW), 2011 WL 6329853, at *5 (E.D.N.Y. Dec. 16, 2011) (stating an offeree's "silence and inaction operate as an acceptance . . . [w]here because of previous dealings *or otherwise*, it is reasonable that the offeree should notify the offeror if he does not intend to accept.") (emphasis added) (citing Rest. 2d of Contracts § 69(1) (1981)).

159. Section 1141(a) of the Bankruptcy Code imposes a duty to speak on the Releasing Parties. *See* Confirmation Hr'g Tr. 36:10-13, *In re Tops Holding II Corp.*, No. 18-22279 (Bankr. S.D.N.Y. Nov. 9, 2018) [Docket No. 783] (finding section 1141(a) of the Bankruptcy Code supplies "the source of the duty to speak" under New York law); Confirmation Hr'g Tr. 120:11-14, *In re Melinta Therapeutics, Inc.*, No. 19-12748 (Bankr. D. Del. Apr. 6, 2018) [Docket No. 502] ("[Section] 1141 binds creditors to a plan and creditors need to, therefore, speak up and object to release provisions, like they need to [for] other provisions."). In other cases, courts have suggested

[55] The SEC cites to Missouri law in its objection. However, under Section 12.7 of the Plan, "the laws of the State of New York … shall govern the rights, obligations, construction, and implementation of [the] Plan." Consequently, New York law, rather than Missouri law, is applicable in determining whether creditors have consented to the Third-Party Releases. Regardless, even under Missouri law, as the SEC notes in its objection, silence may be construed as acceptance where a party is under a duty to speak. *See Pride v. Lewis*, 179 S.W. 3d 375, 379 (Mo. Ct. App. 2005) ("*Absent a duty to speak*, silence may not be translated into acceptance[.]") (emphasis added); *Revere Copper & Brass, Inc. v. Mfrs. Metals & Chems., Inc.*, 662 S.W.2d 866, 870 (Mo. Ct. App. 1983) ("[W]here … a recipient of an offer is *under no duty to speak*, his silence may not be translated into an acceptance[.]") (emphasis added) (citing *Albrecht Chem. Co. v. Anderson Trading Corp.*, 298 N.Y. 437, 440 (1949)).

silence is sufficient to establish consent. *See* Discl. Statement Hr'g Tr. 27:7-11:10, *In re Cumulus Media, Inc.*, No. 17-13381 (Bankr. S.D.N.Y. Feb. 5, 2018) [Docket No. 434] ("Inaction is action under appropriate circumstances. When someone is clearly and squarely told if you fail to act your rights will be affected. That person is then given information that puts them on notice that they need to do something or else."). Thus, contrary to the SEC's argument, principles of contract law are not dispositive in the case of consensual third-party releases in bankruptcy, but even if applicable, they are satisfied here.

160. The SEC and the U.S. Trustee, in arguing the Third-Party Releases are not consensual, rely on certain cases in which creditors were not provided with the ability to opt out, as creditors in these Chapter 11 Cases were able to, through the Ballots or the Opt-Out Election Form. *See* SEC Objection ¶¶ 16-17, 20; U.S. Trustee Objection ¶¶ 25-26. Those cases actually support the Debtors' position. The court in *SunEdison* declined to approve the third-party releases where creditors that did not accept the plan and did not voluntarily consent to the third-party release were included in the releasing parties. *See In re SunEdison, Inc.*, 576 B.R. 453, 460 n.8 (Bankr. S.D.N.Y. 2017). In finding the releases were not consensual, the *SunEdison* court differentiated the plan from the plan in *In re Conseco, Inc.*, 301 B.R. 525 (Bankr. N.D. Ill. 2003), cited by the debtors as an example of consensual third-party releases, and noted that the plan in *Conseco*, unlike in *SunEdison*, allowed for creditors to consent *through the inclusion of an opt-out mechanism*. *Id.* Similarly, the plans in *Arrowmill* and *Congoleum*, cited by the SEC, provided blanket third-party releases, without any opportunity to opt out. *See In re Arrowmill Dev. Corp.*, 211 B.R. 497 (Bankr. D.N.J. 1997); *In re Congoleum Corp.*, 362 B.R. 167 (Bankr. D.N.J. 2007). In contrast, the Third-Party Releases here provided the opportunity for creditors to opt out and, by not opting out, to consent.

161. Finally, the U.S. Trustee argues that creditors that did not receive a Solicitation Package cannot be deemed to consent to the Third-Party Releases.[56] *See* U.S. Trustee Objection ¶ 23. The Debtors do not dispute that parties that did not receive notice are not deemed a Releasing Party under the terms of the Plan. As provided in section 10.6(d) of the Plan, the Third-Party Releases are given by "all holders of Claims who are deemed to accept or reject the Plan, *are provided with a notice of non-voting status providing them with the right to opt out of the releases contained in … Section 10.6*, and do not elect to exercise such right[.]" (emphasis added). If a party did not receive notice of the Third-Party Releases and was not provided an opportunity to opt out of such releases, the party has not consented to the Third-Party Releases and is not a Releasing Party under the Plan. The Debtors need not litigate any particular hypothetical notice issue at the Confirmation Hearing without the benefit of a concrete factual record.[57]

162. In addition to advocating for support of the minority position among courts in other districts regarding consent for third-party releases, the U.S. Trustee and SEC Objections completely ignore the overwhelming support for the Plan, which, as described above, further warrants approval of the Third-Party Releases in this case.

163. Based on the foregoing, the Debtors submit that they have established that the Third-Party Releases are consensual and therefore do not need to satisfy the factors governing

[56] The SEC, in a footnote, makes a similar argument about distribution to beneficial holders of equity interests. *See* SEC Objection n. 4. KCC followed established methods for soliciting holders of public securities. As 500 beneficial holders opted out through their nominees, the Debtors argue such distribution provided effective notice to beneficial holders. The Debtors submit, as with the U.S. Trustee's argument, that this is a hypothetical issue that the Court does not need to decide today.

[57] Any creditors that (i) did not receive a Notice of Non-Voting Status and (ii) may seek to bring a valid claim against the a Third Party that would otherwise be released through the Third-Party Releases may argue, in the event they bring such a claim against a Third Party in the future, that they did not receive notice and are therefore not bound by the Third-Party Releases under the Plan.

non-consensual releases.[58] *See In re Exide Techs.*, 303 B.R. at 74 (holding that because third-party release was consensual, "there [was] no need to consider" whether factors governing non-consensual releases were satisfied); *see also Indianapolis Downs*, 486 B.R. at 305 ("Courts … have consistently held that a plan may provide for a release of third-party claims against a non-debtor upon consent of the party affected.") (citing *In re Spansion*, 426 B.R. at 144).

B. The U.S. Trustee's Objection to Exculpation, the Global Settlement, and Indenture Trustee's Fees Should be Overruled.

164. *Exculpation Provision*. The U.S. Trustee also objects to portions of the Exculpation Provision. In particular, the U.S. Trustee argues that the Exculpation Provision is unduly expansive in extending exculpation to the "Related Parties" and not limiting it to actions taken during the pendency of these Chapter 11 Cases, *see* U.S. Trustee Objection ¶ 28, but this is not correct. The definition of Exculpated Parties in the Plan includes "Related Parties who acted on their behalf *in connection with the matters as to which exculpation is provided herein*" (emphasis added) (*see* Plan, § 1.52). Thus, the exculpation only extends to the relevant matters in the context of these Chapter 11 Cases.

165. The U.S. Trustee also claims that the inclusion of predecessors, successors, and heirs in the definition of the "Related Parties" is overly broad and that the exculpation clause must be limited to fiduciaries who have served during these Chapter 11 Cases. However, this is inconsistent with how courts in this jurisdiction have limited exculpated parties. Indeed, plans recently confirmed in this jurisdiction have included almost identical exculpation provisions. *See Foresight Energy LP* (2020), Case No. 20-41308 [Docket No. 593]; ("(N)o Released Party shall

[58] The SEC argues that *Murray Ky. Energy Inc. v. Ceralvo Holdings LLC (In re Armstrong Energy Inc.)*, 613 B.R. 529 (8th Cir. B.A.P. 2020) controls and that the Debtors do not meet the standards articulated in that case. However, that case governs the standards for approval of nonconsensual third party releases, and, thus, does not govern the relief sought by the Debtors.

have or incur, and each Released Party is hereby released and exculpated from, any Exculpated Claim; 'Released Parties' means . . . such Entity and its Related Persons; 'Related Persons' means . . . That Entity's current and former Affiliates, and such Entities' and their current and former Affiliates' current and former directors, managers, officers . . . ."); *Payless Holdings LLC* (2019), Case No. 19-40883 [Docket No. 1701] ("'Exculpated Parties' means… the 'Released Parties'; 'Released Parties' means . . . each such entities current and former affiliates, officers, directors, predecessors, successors and assigns . . . ."); *In re Peabody Energy Corp.*, No. 16-42529-399 (Bankr. E.D. Mo. Mar. 17, 2017) [Docket No. 2763] ("Released Parties shall neither have nor incur any liability to any Person or entity; 'Released Parties' means . . . each such Person's respective Representatives in their capacity as such; 'Representatives' means, with respect to any Person, any successor, predecessor, assign, subsidiary, affiliate, officer, director . . . ."). The exculpation provisions included in the Plan are narrowly tailored, consistent with confirmed plans in this jurisdiction, and for the reasons set forth herein, the Exculpation Provision should be approved and the objection overruled.

166. *Global Settlement*. Next, the U.S. Trustee objects to the incorporation of the Global Settlement into the Plan. As a preliminary matter, and as stated above, a bankruptcy court has the right to approve a settlement "over the objection of some parties, so long as a settlement is found to be in the best interests of the estate as a whole." *In re Wigley*, 557 B.R. at 686 (quoting *In re Flight Transp. Corp.*, 730 F.2d at 1138). As discussed above, the Global Settlement is in the best interests of the Debtors' estates, in accordance with Bankruptcy Rule 9019.

167. The U.S. Trustee argues that the Global Settlement "should be limited to the parties that have expressly agreed, instead of all claimants, which include general unsecured

creditors." UST Objection, ¶ 29.[59] In support of its objection, the U.S. Trustee states, "[t]he settlement of *claims against a Debtor* subject to FRBP 9019 is limited solely to those parties who have expressly entered into a settlement agreement." UST Objection, ¶ 29 (emphasis added). The only *claims against a Debtor* that were settled via the Global Settlement were those held by the PBGC and the Prepetition Secured Parties, which were parties to the Global Settlement and consented to it.

168. The applicable terms of the Global Settlement were incorporated into the Plan and voted on by creditors of Voting Classes through the solicitation process. All creditors and interest holders of the Debtors received notice of the filing of the Plan and had the opportunity to review the provisions contained therein, including those incorporated from the Global Settlement.

169. The Global Settlement was adequately described to all holders of Claims and Interests in the Disclosure Statement, as evidenced by the approval of the Disclosure Statement.[60] At the request of the U.S. Trustee, and to ensure that all parties in interest were on notice of the Global Settlement, the Debtors added the below language, in bold and capitalized font, to the second page of the Disclosure Statement:

> **CONFIRMATION OF THE AMENDED PLAN WILL BIND ALL CREDITORS TO THE GLOBAL SETTLEMENT WHETHER OR NOT SUCH CREDITORS HAVE VOTED TO ACCEPT THE AMENDED PLAN.**

Disclosure Statement, p. 2.

[59] *See United States Trustee's Objection to Amended Joint Chapter 11 Plan of Reorganization of Briggs & Stratton Corporation and its Affiliated Debtors* [Docket No. 1405].

[60] *See* Solicitation Procedures Order.

170. The Voting Classes, Classes 4(a-e) (General Unsecured Claims against each Debtor), voted overwhelmingly to accept the Plan. Moreover, no creditor objected to the Global Settlement. By accepting the terms of the Plan (per the standard set forth in section 1126 of the Bankruptcy Code), the Voting Classes accepted the terms of the Global Settlement contained therein. Pursuant to section 1141(a) of the Bankruptcy Code, and as discussed above in detail, if the Court confirms the Plan, its provisions will be binding on all creditors and interest holders, whether or not they have voted to accept the Plan. *See* 11 U.S.C. § 1141(a). Accordingly, the Global Settlement, as part of the Plan, should be binding on all claimants and other parties in interest.

171. In addition, as explained above (*see supra*, Part II.A), the Global Settlement is in the best interest of the Debtors and their estates and is an integral part of the distribution scheme provided in the Plan. Accordingly, the U.S. Trustee's request to limit the applicability of the Global Settlement is without merit.

172. *Indenture Trustee Fees and Expenses*. Finally, the U.S. Trustee objects to the payment of the Unsecured Notes Indenture Trustee Fees and Expenses.[61] As noted in the Amended Disclosure Statement and the Amended Plan, the payment of the Unsecured Notes Indenture Trustee Fees and Expenses pursuant to Section 2.4 of the Plan is an integral part of the Global Settlement. *See* Amended Disclosure Statement at 39 n. 45; *see also* Plan § 2.4. Without the Global Settlement, including the payment of the Unsecured Notes Indenture Trustee Fees and

[61] Section 1.120 of the Plan defines the "Unsecured Notes Indenture Trustee Fees and Expenses" as the claims for reasonable fees, indemnities, compensation, expenses, disbursements, advancements, and other amounts due to the Unsecured Notes Indenture Trustee or its predecessor arising under the Unsecured Notes Indenture, including, among other things, attorneys' fees, expenses, and disbursements, incurred by the Unsecured Notes Indenture Trustee or its predecessor prior to the Petition Date and through and including the Effective Date, and reasonable fees and expenses incurred in connection with distributions made pursuant to the Plan or the cancellation and discharge of the Unsecured Notes Indenture.

Expenses provided therein, the Debtors would not have had the Creditors' Committee's support for the Sale Transaction and the Plan.

173. The single case relied on by the U.S. Trustee in arguing that sections 503(b)(3) and (4) of the Bankruptcy Code are the "sole source" of authority to pay the Unsecured Notes Indenture Trustee Fees and Expenses is not dispositive. *Davis v. Elliot Management Corp. (In re Lehman Bros. Holdings Inc.*) was limited to the narrow issue of the payment of statutory committee members' professionals' fees. 508 B.R. 283, 290 (S.D.N.Y. 2014). In relying on *In re Lehman Bros.*, the U.S. Trustee ignores that payment of the Unsecured Notes Indenture Trustee Fees here is incorporated as an integral term of a settlement and overlooks decisions specific to indenture trustee fees finding that section 503(b) of the Bankruptcy Code is *not* the sole means by which an indenture trustee's fees may be paid. *See* Confirmation Hr'g Tr. 38:23-25, *In re Southeastern Grocers, LLC*, No. 18-0700-MFW (Bankr. D. Del. May 15, 2018) [Docket No. 492] ("503(b)(3)(D) is not the only way where [indenture trustee] expenses can be approved and paid in a case.").

174. The crux of the U.S. Trustee's argument is that, pursuant to 503(b)(3), the Unsecured Notes Indenture Trustee is subject to the detailed requirements of proving "substantial contribution" in the bankruptcy case before approval and payment, citing to *Calpine Corp. v. O'Brien Envtl. Energy Inc*., as evidence that payment is fully dependent upon the requesting party's ability to show to the bankruptcy court that its work was necessary to preserve the value of the estate. As indicated above, the payment of the Unsecured Notes Indenture Trustee Fees is a key term of the Global Settlement; the Global Settlement was essential to preserve and maximizing the value of the Debtors' estates, by paving the way to a successful Sale Transaction that was

supported by key creditors and a Plan that has garnered the support and acceptance of all voting Classes of creditors.

175. Payment of indenture trustee fees, when paid in accordance with the terms of a settlement, do not need bankruptcy court review under section 503(b) of the Bankruptcy Code. *See In re Stearns Holdings LLC*, 607 B.R. 781, 792-793 (Bankr. S.D.N.Y. 2019). In *Stearns*, the U.S. Trustee similarly objected to the payment of the fees and expenses of the indenture trustee of the undersecured and unsecured notes pursuant to a global settlement, and asserted that the indenture trustee must seek reimbursement pursuant to section 503 of the Bankruptcy Code. *Id* at 792. The court, however, "decline[d] to evaluate under section 503 of the Code the Amended Plan's provision for payment of such [indenture trustee and other] professional fees under such settlement," and held that "where consideration is paid pursuant to a settlement, the Court need not review such payment... because, pursuant to Bankruptcy Rule 9019, the Court has approved the Global Settlement, the Court declines to evaluate under section 503 of the Code the Amended Plan's provision for payment of such professional fees under such settlement" *Id*. at 793. Like the U.S. Trustee here, the U.S. Trustee in *Stearns* similarly cited to *In re Lehman Bros.* in its objection, and the court there overruled it as inapplicable. *Id.*

176. Indeed, courts in this jurisdiction have similarly approved payment of indenture trustee fees pursuant to a settlement embodied in the plan. *See In re Peabody Energy Corp.*, No. 16-42529-399 (Bankr. E.D. Mo. Mar. 17, 2017) [Docket No. 2763] (approving payment to the Subordinated Indenture Trustee as part of the Global Settlement incorporated in the Plan); *In re Arch Coal Inc.*, No. 16-40120 (Bankr. E.D. Mo. Sept. 15, 2016) [Docket No. 1334] (confirming plan authorizing the payment of unsecured notes indenture trustee fees);[62] *see also In*

[62] In *Arch Coal*, the Debtors made a similar argument [Docket No. 1308], stating that "The Restructuring Support Agreement and Disclosure Statement are clear that the Indenture Trustee Fees are to be paid separately under the Plan

re EP Energy Corp., No. 19-35654 (Bankr. S.D. Tex. Aug. 27, 2020) [Docket No. 1411] (confirming plan including payment of fees for indenture trustee for unsecured notes).

177. Under the Global Settlement, which the Court has the authority to approve as a transaction outside the ordinary course of business, the Debtors incurred the obligation to pay the Unsecured Notes Indenture Trustee Fees and Expenses, which obligations are further authorized pursuant to section 364(b) of the Bankruptcy Code. 11 U.S.C. § 364(b) (authorizing the debtor to "incur unsecured debt . . . allowable under section 503(b)(1) of this title as an administrative expense"). The payment of such administrative expense pursuant to section 503(b)(1) is, thus, mandatory, rather than permissive, and does not entail the same requirements as payments pursuant to sections 503(b)(3) and (4) of the Bankruptcy Code. As such, the payment of the Unsecured Notes Indenture Trustee Fees and Expenses in this case is further distinguishable from the cases cited in the U.S. Trustee's objection.

178. For the foregoing reasons, the U.S. Trustee's objection to the payment of the Unsecured Notes Indenture Trustee Fees and Expenses should be overruled.

C. All Other Objections Have Been Addressed, Withdrawn, or Resolved.

179. The remainder of the formal objections, including those filed by A.B., Aavid, UFPT, Oracle, and the Insurers [Docket Nos. 1395, 1396, 1400, 1406] have been resolved with language in the Confirmation Order or Amended Plan, as applicable as more fully set forth in the Objection Response Chart. The Debtors submit that, as reflected herein and in the Objection Response Chart, all informal and formal objections have been addressed, withdrawn or otherwise

and not taken from the distributions to unsecured creditors. If the U.S. Trustee's objection is sustained and the Plan is amended to omit payment of the Indenture Trustee Fees and Expenses, the agreed distributions to holders of Notes Claims will be reduced by the full amount of the Indenture Trustee Fees and Expense because each of the Indenture Trustees benefits from a charging lien under the applicable Indenture, which the Plan cannot and does not discharge."

resolved, including through language in the Confirmation Order or clarifying changes to the Amended Plan, and the outstanding Objections from the U.S. Trustee and the SEC are without merit as to any remaining issues and should be overruled.

V. CAUSE EXISTS TO WAIVE STAY OF THE CONFIRMATION ORDER.

180. The Debtors respectfully request that the Court direct that the Confirmation Order shall be effective immediately upon its entry, notwithstanding the 14-day stay imposed by operation of Bankruptcy Rules 3020(e). Bankruptcy Rule 3020(e) provides that: "[a]n order confirming a plan is stayed until the expiration of [fourteen] 14 days after the entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 3020(e). Further, as the Advisory Committee notes to Bankruptcy Rule 3020(e) state, "the court may, in its discretion, order that Rule 3020(e) is not applicable so that the plan may be implemented and distributions may be made immediately." Fed. R. Bankr. P. 3020(e) advisory committee's note to 1999 amendment.

181. Each day the Debtors remain in chapter 11, they incur significant administrative and professional costs—expenses that are unnecessary in light of the support for the Plan. *See* Ficks Declaration ¶ 47. Under the circumstances, it is appropriate for the Court to exercise its discretion to order that Bankruptcy Rule 3020(e) is not applicable so as to permit the Debtors to consummate the Plan and commence the Plan's implementation without delay following the entry of the Proposed Confirmation Order. Such relief is in the best interests of the Debtors' Estates, creditors, and other parties in interest and will not prejudice the rights of any parties in interest.

VI. CONCLUSION.

182. Based upon the foregoing, the Plan complies with and satisfies all the requirements for confirmation set forth in section 1129 of the Bankruptcy Code and represents the culmination of extensive settlement efforts on behalf of the Debtors, the Creditors' Committee,

and the parties in interest to maximize the value of the Debtors' Estates through the consummation of the Sale Transaction and the winding down of each of the Debtors' Estates. The Objections should, therefore, be overruled, each of the compromises and settlements embodied in the Plan should be approved, and the Plan should be confirmed.

[*Remainder of page intentionally left blank*]

Dated: December 16, 2020
St. Louis, Missouri

Respectfully submitted,

CARMODY MACDONALD P.C.

/s/ Robert E. Eggmann

Robert E. Eggmann, #37374MO
Christopher J. Lawhorn, #45713MO
Thomas H. Riske, #61838MO
120 S. Central Avenue, Suite 1800
St. Louis, Missouri 63105
Telephone: (314) 854-8600
Facsimile: (314) 854-8660
Email: ree@carmodymacdonald.com
cjl@carmodymacdonald.com
thr@carmodymacdonald.com

Local Counsel to the Debtors and Debtors in Possession

-and-

WEIL, GOTSHAL & MANGES LLP
Ronit J. Berkovich (admitted *pro hac vice*)
Debora A. Hoehne (admitted *pro hac vice*)
Martha E. Martir (admitted *pro hac vice*)
Eli Blechman (admitted *pro hac vice*)

767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
Email: Ronit.Berkovich@weil.com
Debora.Hoehne@weil.com
Martha.Martir@weil.com
Eli.Blechman@weil.com

Counsel to the Debtors and Debtors in Possession

Exhibit A

Objection Summary Chart

Objection Response Chart[1]

	Objecting Party	Summary of Objection	Debtors' Response	Status
1.	A.B. Boyd Co. ("**A.B.**"), Aavid Allcast, LLC ("**Aavid**") and UFP Technologies, Inc. ("**UFPT**"). [Docket Nos. 1395 & 1396]	A.B., Aavid and UFPT objected to the Plan on the grounds that because the Plan does not separately classify their administrative claims, their administrative claims were not entitled to vote on the Plan or opt out of the Plan's release provisions. A.B., Aavid and UFPT request that the Confirmation Order state that the releases and injunctions set forth in Section 10.6 of the Plan do not apply to A.B., Aavid and UFPT.	The Debtors have included language in the Confirmation Order providing that, notwithstanding anything to the contrary in the Disclosure Statement, the Plan or the Confirmation Order, A.B., Aavid and UFPT shall be deemed to have (1) received an Opt-Out Election Form in connection with their Allowed Administrative Expense Claims, (2) timely returned the Opt-Out Election Form prior to the Opt-Out Deadline, and (3) elected not to grant the releases contained in Section 10.6 of the Plan.	**Resolved.**
2.	Oracle America, Inc. ("**Oracle**") [Docket No. 1400]	Oracle objected to the Plan on the grounds that Section 8.4 of the Plan appears to assume the Oracle Agreements by default. Oracle further argues that the Plan may not do so before the Debtors: 1. Obtain Oracle's consent, which is required under section 365(c) of the Bankruptcy Code for non-exclusive copyright licenses; and 2. Pay all outstanding cure amounts, or provide adequate assurance for future performance, under the Oracle Agreements pursuant to section 365(b) of the Bankruptcy Code.	The Debtors have included in the Confirmation Order language providing, that, (1) the relevant license agreements, including all related technical support services, between the Debtors and Oracle are deemed rejected as of the date of entry of the Confirmation Order and (2) none of the agreements between the Debtors and Oracle shall be assumed pursuant to Section 8.4 of the Plan or any other Plan provision.	**Resolved.**
3.	The United States Securities and Exchange Commission (the "**SEC**")	The SEC objected to the Plan on the grounds that the Plan contains provisions that release and discharge the liability of non-debtor parties,	The Debtors submit that the Third-Party Releases are consensual based on applicable law and the majority of the precedent and, therefore, do not	**Pending.**

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Memorandum or the Plan, as applicable. The Debtors received other informal comments to the Plan, which are addressed in the Memorandum and were resolved by adding language to the Plan, Confirmation Order, or through other filings.

	Objecting Party	Summary of Objection	Debtors' Response	Status
	[Docket No. 1401]	particularly public shareholders, without providing an opportunity for those subject to these releases to affirmatively consent to be bound by them. The SEC argues that, absent affirmative consent, such releases are nonconsensual in nature, and, therefore, the Debtors must show that they meet the Eighth Circuit's multi-factor test for approval of nonconsensual third-party releases.	need to satisfy the factors governing non-consensual releases. *See* Debtors' Confirmation Brief ¶¶ 130-162.	
4.	The United States Trustee for the Eastern District of Missouri (the "**U.S. Trustee**") [Docket No. 1405]	The U.S. Trustee objected to the Plan on the grounds that: 1. The Plan proposes non-consensual third-party releases in favor of non-Debtors through an opt out election. The U.S. Trustee argues that an opt in mechanism is required for the third-party releases to be deemed consensual; 2. The Plan extends exculpation coverage beyond estate fiduciaries to include entity predecessors, successors and heirs. The U.S. Trustee argues that an exculpation clause must be limited to fiduciaries who served during the chapter 11 proceeding and limited to their actions or inactions taking place during the bankruptcy cases; 3. The Plan seeks to pay the Unsecured Notes Indenture Trustee Fees and Expenses without requirement for Bankruptcy Court review. The U.S. Trustee argues that, pursuant to section 503 the Bankruptcy Code, the Debtors must show that the Unsecured Notes Indenture Trustee Fees and Expenses were actual, necessary and reasonable, and that the creditor, unofficial committee or indenture trustee has made a substantial contribution to the bankruptcy case; and	The Debtors submit that: 1. The Third-Party Releases are consensual based on applicable law and the majority of the precedent and, therefore, do not need to satisfy the factors governing non-consensual releases. *See* Debtors' Confirmation Brief ¶¶ 130-162. 2. The exculpation provisions included in the Plan are narrowly tailored and consistent with confirmed plans in this jurisdiction. *See* Debtors' Confirmation Brief ¶¶ 163-164. 3. Section 503(b) of the Bankruptcy Code is not the sole means by which indenture trustee's fees may be paid. See Debtors' Confirmation Brief ¶ 172. Payment of indenture trustee fees, when made in accordance with the terms of a settlement, does not need to satisfy section 503(b) of the Bankruptcy Code. *See* Debtors' Confirmation Brief ¶ 174. 4. Pursuant to section 1141(a) of the Bankruptcy Code, if the Court confirms the Plan, its provisions will be binding on all creditors and interest holders, whether or not they have voted to accept the Plan. *See* Debtors' Confirmation Brief ¶ 169. In addition, the Global Settlement is in the best interest of the Debtors and their estates and is an integral part of the distribution	**Pending.**

	Objecting Party	Summary of Objection	Debtors' Response	Status
		4. The Global Settlement should bind only the parties that have expressly agreed to such settlement.	scheme provided in the Plan. *See* Debtors' Confirmation Brief ¶¶ 112-113.	
5.	Century Indemnity Company, Transportation Insurance Company, Inc., Continental Casualty Company, American Home Assurance Company, Nationwide Indemnity Company and Employers Insurance of Wausau (collectively, the "**Insurers**") [Docket No. 1406]	The Insurers objected to the Plan on the grounds that the Plan is not "insurance neutral" because it purports to allow the Plan Administrator to assume control of the defense and settlement of claims that the Insurers have agreed to handle, but does not exempt the Insurers from having to pay any claim controlled or settled by the Plan Administrator. The Insurers argue that in doing so, the Plan impairs their rights under their insurance contracts and applicable nonbankruptcy law.	The Debtors have amended the Amended Plan to include language to address and resolve the objection of the Insurers (*e.g.*, by adding more explicit language regarding the Insurers' and Plan Administrator's rights with respect to Insured Claims). *See* Plan, §§1.31, 1.62, 1.64, 5.4(g), 7.2, 7.5, 7.9, 8.1, 8.3, and 10.13. Such changes are reflected in the blackline of the Plan filed contemporaneously herewith.	**Resolved.**